Cosmopolitan Greetings:
Mixed-Form inter-American Judicial Review and the Latin American Path to Global Constitutionalism

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Zusammenfassung

In den letzten Jahrzehnten hat sich in Lateinamerika ein neuer Kontext für die Durchsetzung von Menschenrechten herausgebildet. Die organisatorische Entwicklung des Interamerikanischen Menschenrechtsschutzsystems (IAS), die Verabschiedung neuer Verfassungen durch die nationalen Gesetzgeber und die Anwendung innovativer Verfassungsauslegungen durch die maßgeblichen Gerichte in der Region haben zur Entstehung eines kosmopolitischen lateinamerikanischen Konstitutionalismus geführt. In diesem neuen Kontext hat der Interamerikanische Gerichtshof für Menschenrechte (IACtHR) damit begonnen, die gerichtliche Überprüfung innerstaatlicher Gesetze zu praktizieren, d.h. er hat bei mehreren Gelegenheiten nationale Behörden angewiesen, innerstaatliche Gesetze wegen ihrer Unvereinbarkeit mit der Amerikanischen Menschenrechtskonvention (ACHR) für ungültig zu erklären. Angesichts der zunehmenden Konflikte zwischen nationalen und internationalen Menschenrechtsautoritäten zielt diese Studie darauf ab, den legitimsten und effektivsten Ansatz für die Praxis der interamerikanischen Konventionskontrolle zu finden. Ausgehend von der Debatte über die innerstaatliche richterliche Normenkontrolle werden zunächst die Gründe für die Praxis einer starken internationalen Normenkontrolle untersucht. Anschließend adressiert diese Studie Theorien, die versucht haben, die interamerikanische Konventionskontrolle zu schwächen. Diese Theorien haben sich häufig für die Übernahme des nationalen Ermessensspielraums auf der Grundlage der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte ausgesprochen. Schließlich plädiert die vorliegende Studie für eine kontextbasierte Theorie der interamerikanischen gerichtlichen Überprüfung und versucht, den nationalen Ermessensspielraum mit dem kosmopolitischen Konstitutionalismus Lateinamerikas in Einklang zu bringen. Die Theorie der gemischten Form der Konventionskontrolle befasst sich mit der Entwicklung der interamerikanischen Menschenrechtsgesetzgebung und Rechtsprechung. Ihr zufolge sollte das IACtHR in Fällen, in denen Mitgliedstaaten die durch die interamerikanischen Menschenrechtsgesetze geschützten bürgerlichen und politischen Rechte eklatant verletzen, eine starke Konventionskontrolle praktizieren. Dies ist auf die starke normative Dimension dieser Rechte innerhalb der interamerikanischen Menschenrechtsgesetzgebung zurückzuführen. Dagegen sollte das IACtHR dieser Theorie zufolge in Fällen, die sozioökonomische Rechte betreffen, eine schwache gerichtliche Überprüfung praktizieren, da diese erst spät in den interamerikanischen Menschenrechtsgesetzen und der Rechtsprechung auftauchen. Diese Studie beabsichtigt auch, die Nützlichkeit dieser Theorie für den kosmopolitischen Konstitutionalismus Lateinamerikas konkret aufzuzeigen, indem sie auf brasilianische Gesetze angewandt wird. Vor allem beansprucht diese Studie jedoch den Wert dieses rechtswissenschaftlichen Ansatzes für die Förderung der Entwicklung des globalen Konstitutionalismus in Lateinamerika zu belegen.

Abstract

In recent decades, a new human rights enforcement context has emerged in Latin America. The organizational evolution of the Inter-American System for Human Rights Protection (IAS), the adoption of new constitutions by national legislatures, and the adoption of innovative constitutional interpretations by the most authoritative courts in the region have led to the emergence of Latin American cosmopolitan constitutionalism. Within this new context, the Inter-American Court of Human Rights (IACtHR) has started practicing the judicial review of domestic laws, i.e., on several occasions, it has ordered national authorities to invalidate domestic laws due to their incompatibility with the American Convention on Human Rights (ACHR). By reviewing domestic laws, the IACtHR has placed itself in the middle of a dialogue between legislatures and courts that was long seen as an exclusively domestic conversation within Latin American constitutionalism. This strong form of international jurisprudence has made the normative questions relating to judicial review much more complex to address. Given the increasing conflicts between domestic and inter-American human rights authorities, this study aims to find the most legitimate and effective approach to the practice of inter-American judicial review. In line with this, and drawing on the debate about domestic judicial review, it first assesses the reasons behind the practice of strong international judicial review. In order to offer a better form of inter-institutional interaction within the IAS, this study later addresses theories that have sought to weaken the practice of inter-American judicial review based on the principle of subsidiarity. These theories have often advocated for the adoption of the national margin of appreciation based on the European experience with this concept of deference to national authorities. Finally, this study advocates for a context-based theory of inter-American judicial review and tries to reconcile the national margin of appreciation with Latin American cosmopolitan constitutionalism. The theory of mixed-form inter-American judicial review looks at the evolution of inter-American human rights legislation and jurisprudence. According to this theory, the IACtHR should practice strong inter-American judicial review in cases in which member states flagrantly violate the civil and political rights protected by inter-American human rights law. This is due to the arguably strong normative dimension of these rights within inter-American human rights law. By contrast, according to this theory, the IACtHR should practice weak inter-American judicial review in cases involving socioeconomic rights due their late emergence within inter-American human rights law. This study also intends to prove the usefulness of mixed-form theory for Latin American cosmopolitan constitutionalism by applying it to Brazilian laws. Most importantly, it seeks to prove the value of this jurisprudential approach for promoting the evolution of global constitutionalism in Latin America.

Für Paul

Stand up against governments, against God.
Stay irresponsible.
Say only what we know & imagine.
Absolutes are coercion.
Change is absolute.
Ordinary mind includes eternal perceptions.
Observe what's vivid.
Notice what you notice.
Catch yourself thinking.
Vividness is self-selecting.
If we don't show anyone, we're free to write anything.
Remember the future.

(Allen Ginsberg, Cosmopolitan Greetings)

Come writers and critics, who prophesize with your pen
And keep your eyes wide, the chance won't come again
And don't speak too soon
For the wheel's still in spin
And there's no tellin' who that it's namin'
For the loser now will be later to win
For the times they are a-changin'

(Bob Dylan, The Times They Are a-Changin')

Acknowledgements

When I started doing my research on the relationship between constitutional and international law in Latin America at the end of 2016, I already had uneasy feelings about the stability of democracy in the region. The impeachment of Brazilian President Dilma Rousseff in 2016 gave me the first impression that democracy in my country was under threat. I was born in the 1990s, which was the first decade of the new Brazilian democracy established after years of authoritarian politics. During three decades, this new democracy was aligning its practices with the ones found in more mature constitutional democracies around the world. Brazilians were finally enjoying their civil and political rights, and the political authorities were finding ways to address the massive social inequality in the country by implementing socioeconomic rights. Little did I know how the end of this era could affect my generation and the future generations. Brazil is currently under the rule of an authoritarian government, which is evidence that many things have gone wrong.

It is necessary to find the way back to consistent institutional development. I was lucky to have written this study in one of the few still remaining functional constitutional democracies in the world. All these years in Germany served not only to improve my knowledge of *Rechtswissenschaft* and *Dogmatik* but also gave me the chance to look at Latin American countries through a different perspective. By living abroad, one realizes that things can be different. Maybe this is the reason why cosmopolitan constitutionalists often strive to change domestic constitutional law.

Many institutions and people helped me during my PhD studies in Germany. I would first like to thank my family for all the support and patience during all these years of research. I wonder if my mother would had voluntarily sent me to any German language school if she knew that this would take me away from her, later on in life, for several years. I would also like to thank Mattias Kumm for accepting to supervise this dissertation and for providing me the best academic environment in Berlin. Attending different events organized by him, I had the opportunity to personally meet several authors that I admire. This provided me the motivation to keep on working on this study. Furthermore, I want to thank all the staff of the Wissenschaftszentrum Berlin (WZB) for being so supportive.

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Introduction

i. The Inter-American Judicial Review of Domestic Laws

If constitutional lawyers were asked to name one indispensable feature of constitutional democracies, many would probably pick the judicial review of legislation. The fact that courts invalidate legal texts is currently a part of everyday life in constitutional democracies.[1] In textbooks on constitutional theory, judicial review now appears as a natural element of constitutional law.[2] The historical descriptions of judicial review often claim its spontaneous and logical emergence within the institutional apparatus of modern democracies.[3] Judicial review has successfully migrated to constitutional orders around the globe. This attests to the argument that it was an idea too good to be kept in its own original context.[4] Over time, judicial review has ceased to be a spontaneous form of judicial self-empowerment and nowadays figures as an established legal practice, which is institutionalized within many legal systems.[5]

As we all know, the practice of judicial review has far reaching consequences for the evolution of domestic constitutionalism. These consequences can be easily observed when we focus on a specific constitutional order under the authority of a powerful constitutional court.

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[1]"The power of courts to review the constitutionality of legal norms enacted by democratic organs is one of the central features of constitutional or liberal democracies." Carlos Santiago Nino, The Constitution of Deliberative Democracy, (New Haven, London: Yale University Press, 1996), 187. "[J]udicial empowerment through the constitutionalization of rights and the establishment of judicial review now appear to be the widely accepted conventional wisdom of contemporary constitutional thought." Ran Hirschl, Towards Juristocracy. The Origins and Consequences of the New Constitutionalism, (Cambridge, London: Harvard University Press, 2004), 2.

[2]This is particularly true in Germany. See: Christoph Möllers, "Scope and Legitimacy of Judicial Review in German Constitutional Law – the Court versus the Political Process," in *Debates in German Public Law*, eds. Hermann Pünder, Christian Waldhoff, (Oxford: Hart Publishing, 2014), 3-26.

[3]In a critical perspective see: Michel Troper, "The Logic of Justification of Judicial Review," International Journal of Constitutional Law 1, (2003), 99-121.

[4]It is common sense that judicial review emerged in the world of law when the U.S. Supreme Court decided *Marbury v. Madison*. There have been some scholars that contest the practical importance of this case for the contemporary notion of judicial review. On this issue see, for instance: *Arguing Marbury v. Madison*, ed. Mark Tushnet, (Stanford: Stanford University Press, 2005). It is possible to follow the evolution of judicial review in its original context with Bruce Ackerman's work, see: Bruce Ackerman, We the People 1-3, (Cambridge et al.: Harvard University Press, 1991-2014). Despite this debate, the most decisive issue is that the concept of judicial review has become institutionally disruptive within contemporary constitutional democracies.

[5]Historically, Hans Kelsen was responsible for the institutionalization of judicial review with his work for the 1919 Austrian constituent assembly. For Kelsen, this institutionalization was the most efficient mechanism to solve the inconsistencies of decisions on the validity of legislation that were issued by different courts within domestic law: "a centralization of the judicial review of legislation was highly desirable in the interest of the authority of the constitution." Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution," The Journal of Politics 4, no. 2, (1942), 183-200, 186. The constitutionalization of judicial review around the globe proves that many political and judicial authorities have shared this interpretation of the relationship between judicial review and the authority of constitutional law.

The Brazilian constitutional court, for instance, has turned the constitutional order into its own scrapbook. The court has the power to add or to strike down pieces of legislation as it pleases. Its decisions are nationally broadcast, and the judges often behave similarly to legislators, although, as unelected officials, they enjoy no democratic authority.[6] This broad interpretation of judicial review has not only been practiced by the Brazilian constitutional court. Indeed, broad-scope judicial review is present in many constitutional orders, which explains why it has been intensely discussed by legal scholars from different constitutional backgrounds in the last decades.

The amount of literature on judicial review attests to its importance but it also represents a challenge for legal scholars aiming to offer a different perspective on the legitimacy and effectiveness of judicial review. Despite all the challenges that these legal scholars may face, it is worth trying to rethink judicial review given that it has been changing in many legal systems due to the increasing authority of international courts within domestic law. Some international courts have started reviewing domestic laws, basing their decisions on international treaties. These international treaties bind the national legislatures responsible for enacting domestic laws and also domestic courts, which are empowered to conduct judicial reviews. This means that international judicial review has a transformative role with respect to constitutional lawmaking and interpretation, which affects especially domestic legislative and judicial authorities.

International judicial review is a new feature for many constitutional democracies that are not members of more advanced international organizations like the European Union.[7] The consequences of the practice of international judicial review have still not been properly debated in terms of their effects on many constitutional orders. This is especially true with regard to the Latin American constitutional orders under the authority of the Inter-American Court of Human Rights (IACtHR). The increasing importance of international human rights adjudication in Latin America has been remarkable throughout the organizational evolution of

[6]The Brazilian constitutional court has decided that discrimination against LGBT people should be considered a crime based on the interpretation of legislation on racism. Judicial intervention in this case was arguably necessary due to the absence of specific legislation on discrimination based on sexual orientation within domestic law. The Brazilian legislature notified the court that several legislative projects were being discussed on the issue. The constitutional court has notwithstanding decided that it had authority over the matter due to the legislative inertia and delay in enacting specific legislation on this type of discrimination.

[7]In Europe, the discussions of international judicial review started gaining more relevance due to jurisprudence of the European courts, i.e., the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). Outside European law there are some examples of debate on international judicial review. This debate, however, is usually led by European scholars. See, for instance, the Cambridge series of books: *Studies on International Courts and Tribunals*, eds. Geir Ulfstein, Andreas Føllesdal.

the inter-American System for Human Rights Protection (IAS). Given that international human rights law has acquired a privileged position within some constitutional orders, the IACtHR has started deciding upon the validity of domestic pieces of legislation, and therefore it has come to play a role similar to that of a constitutional court in Latin America.

The IACtHR has empowered itself by practicing inter-American judicial review of domestic laws. These laws have been invalidated mostly based on an extensive interpretation of a notable provision of the American Convention on Human Rights (ACHR). According to Art. 2 ACHR, the IAS member states "undertake to adopt, in accordance with their constitutional processes" and the ACHR provisions, "such legislative or other measures as may be necessary to give effect" to the rights and freedoms recognized in the convention.[8] Based mostly on Art. 2 ACHR, the IACtHR started invalidating domestic laws that, according to the interpretation of the majority of the IACtHR judges, are not in accordance with inter-American human rights law.

The most prominent cases of inter-American judicial review involved the IACtHR's invalidation of domestic amnesty statutes, which were adopted by national authorities as a condition for bringing an end to authoritarian regimes in Latin America. Since the 2000s, the IACtHR has started reviewing the adoption of these amnesty laws and has declared them incompatible with the ACHR. The court has understood that these laws often served as an obstacle to prosecuting human rights offenders. Due to this incompatibility, the IACtHR has on several occasions ordered judicial authorities to invalidate the amnesty statutes within domestic law. More recently, after decades of democratic rule in most Latin American countries, the IACtHR started extending inter-American review to cases involving socioeconomic rights. This illustrates the court's concern with issues like material inequality and institutional failure in Latin America. Recent inter-American case law on socioeconomic rights point to the emergence of a specific form of inter-American judicial review of domestic legislation pertaining to these rights as well.

The practice of international judicial review illustrates the IACtHR's increasing authority over Latin American constitutional orders. Compared to other regional human rights courts, the IACtHR seems to be the most ambitious adjudicative body in terms of its desire to influence domestic law. This ambitious attitude is unusual for an international human rights

[8]ACHR, art. 2. There is no equivalent provision to this one in the European Convention on Human Rights (ECHR).

court, which should limit its authority to the subsidiary protection of human rights and primarily defer to national authorities' decisions, as some commentators have argued. This has caused debate among legal scholars about the consequences that inter-American judicial review may have for domestic constitutional law in Latin America. Has the IACtHR gone too far by practicing a form of international *juristocracy*[9] or should domestic state authorities trust the IACtHR's scrutiny of domestic legislation? Should legal scholars embrace or be cautious of the inter-American practice of judicial review? Has this court been consistent in its practice of international judicial review throughout its jurisprudence? What kind of legitimacy and effectiveness problems may the practice of inter-American judicial review bring about within the IAS? In light of these problems, is there a better approach that the IACtHR could adopt to international judicial review? This study will address these questions and, based on the contemporary phase of inter-American human rights law, seek to identify the best approach that the IACtHR could adopt to the review of domestic laws.

Inter-American judicial review makes the normative questions that are inherent in the practice of judicial review even harder to address. It includes an international court in the inter-institutional interaction that is implicit in the practice of judicial review within national law. This inter-institutional interaction has traditionally been perceived as a domestic issue by legal authorities and scholars. Now, it is not just the highest domestic courts and national legislatures who are claiming the authority to review or amend domestic laws. With regard to this particular evolution of inter-American human rights jurisprudence, this study argues that neither skepticism nor enthusiasm can suffice. If there is something that legal scholars have learned from debating judicial review within domestic law, it is that opposing parliamentary and judicial supremacy will not take them very far when seeking to address hard judicial review cases.[10] Describing the relationship between national and international law based on the dualism of monism versus pluralism is also arguably of no use for this study. Indeed, these dualisms cannot take us very far when analyzing the legitimacy and effectiveness of inter-American judicial review. Beyond these simplistic dualisms (legislative versus judicial

[9]As Mattias Kumm has explained to me, even before Ran Hirschl turned the term *juristocracy* famous in comparative constitutional law scholarship, Ernst-Wolfgang Böckenförde had coined the term "*Jurisdiktionsstaat*" with a strong normative sense. According to this normative sense of juristocracy, the powers of determined courts cannot be democratically legitimated. See, for instance: Ernst-Wolfgang Böckenförde, "Grundrechte als Grundsatznormen: Zur Gegenwärtigen Lage der Grundrechtsdogmatilk," Der Staat 29, no. 1, (1990), 1-31, 25. Kumm has noted that this study often uses juristocracy in a descriptive way, i.e., in order to describe how the IACtHR has extended its authority to reviewing domestic laws.

[10]A summary of this debate can be found in: Mark Tushnet, "Judicial Review of Legislation," in *Oxford Handbook of Legal Studies*, eds. Mark Tushnet, Peter Cane, (Oxford et al.: Oxford University Press, 2005), 165-182.

supremacy, monism versus dualism), this study tries to assess the normative questions of international judicial review based on two helpful concepts for understanding and guiding its inter-American practice: cosmopolitan constitutionalism and global constitutionalism. Cosmopolitan constitutionalism is related to the context of emergence of inter-American judicial review. Global constitutionalism refers to the evolution of constitutional law and legal scholarship in recent decades, i.e., it stands for how legal scholars may engage in the discussion of international judicial review in a way that enables them to provide the most suitable approach to its inter-American practice.

Cosmopolitan constitutionalism helps us understand how the emergence of inter-American judicial review was possible in Latin America. This has mostly involved elements of positive human rights law that strengthened the relationship between Latin American constitutional orders and the inter-American institutions for human rights protection. This study will explain how the evolution of Latin American constitutionalism has led to the emergence of top-down and bottom-up elements of cosmopolitan constitutionalism with regard to human rights protection. The convergence of these elements has strengthened the authority of human rights law within domestic constitutional orders, creating an environment for the IACtHR's review of domestic laws. The practice of inter-American judicial review has introduced new elements in the relationship between the IACtHR and national authorities and made this relationship more complex. The issuing of conflicting decisions by different courts on the validity of domestic laws has become a common element within the IAS. For instance, if the IACtHR reviews a domestic law and this law has already had its validity confirmed by a domestic constitutional court, which decision should prevail? When addressing questions like this one, which relates to the legitimacy and effectiveness of inter-American judicial review, legal scholars may find it useful to pay attention to a new form of constitutional law and scholarship that has spread around the globe in most recent decades, i.e., global constitutionalism.

Among the different definitions of global constitutionalism offered by legal scholars,[11] a particularly appealing one for this study defines global constitutionalism as a "jurisprudential

[11]See, for instance, all the editorials of the journal *Global Constitutionalism: Human rights, Democracy, and The Rule of Law*. See also: Anne Peters, "Global Constitutionalism," in *The Encyclopedia of Political Thought*, ed. Michael T. Gibbons (Malden, MA: Wiley Blackwell, 2015), 1484-1487; *Handbook on Global Constitutionalism*, eds. Anthony Lang, Antje Wiener, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2017); *Global Constitutionalism from European and East Asian Perspectives*, eds. Takao Suami, Anne Peters, Dimitri Vanoverbeke, Mattias Kumm, (Cambridge: Cambridge University Press, 2018).

approach."[12] As Mattias Kumm has explained, global constitutionalism "provides a cognitive frame, or mindset, for understanding and engaging the world of law."[13] Despite the fact that conflicting theories could simultaneously figure under the thread of global constitutionalism, there seems to be a convergence of positive constitutional law and scholarship with regard to three indispensable elements, which, in turn, translate into indispensable fields of research: human rights, democracy, and the rule of law.[14] In fact, global constitutionalism, as an outgrowth of modern constitutionalism, involves strong commitments to human rights, democracy, and the rule of law on the part of state authorities, and also on the part of scholars who engage the world of law.

Cosmopolitan constitutionalism and global constitutionalism are essential concepts for this study when trying to address the hard questions that inter-American judicial review presents for Latin American constitutionalism. Within the Latin American cosmopolitan human rights context, this study argues that the IACtHR can become an ally of global constitutionalism in Latin America. The IACtHR can, by practicing inter-American judicial review, ensure that domestic constitutional orders remain strongly committed to human rights enforcement, which also has consequences for the other two pillars of global constitutionalism. However, the court itself is under the scrutiny of global constitutionalist scholars, which means that there is no scope for inter-American judicial activism, understood as the illegitimate and discretionary use of judicial power by the IACtHR. Based on this relationship between cosmopolitan and global constitutionalism, this study advocates for a normative theory of inter-American judicial review, i.e., mixed-form inter-American judicial review. This theory is intended to guarantee that domestic and inter-American authorities consistently abide by their commitments to human rights, democracy, and the rule of law within the cosmopolitan context for human rights enforcement in Latin America. This study also argues that this relationship between cosmopolitanism and global constitutionalism is essential for the further evolution of Latin American constitutionalism. Global constitutionalism lawmaking and scholarship is particularly useful for Latin American constitutions that are seeking to find a way out of the

[12]Mattias Kumm, "On the History and Theory of Global Constitutionalism," in *Global Constitutionalism from European and East Asian Perspectives*, 168-199.
[13]Ibid, 170.
[14]Mattias Kumm has on several occasions referred to these three elements as the Trinitarian constitutionalist *mantra*, *grammar* or *formula*. See, for instance: Mattias Kumm, "Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law," International Journal of Constitutional Law 14, no. 3, (2016), 697-711, 710.

never-ending cycle of illiberalism brought about by the insular evolution of domestic constitutionalism in the region.

ii. Methodology

This study aims, first and foremost, to offer a context-specific theory of international human rights adjudication with regard to the practice of inter-American judicial review of domestic law. Context-orientation is probably the most decisive methodological element. Even if the study borrows concepts from foreign contexts and applies them to its descriptive and normative parts, it tries to discuss these concepts in light of the Latin American human rights enforcement context. The concept of cosmopolitan constitutionalism illustrates this approach well.

This study is aware that cosmopolitan constitutionalism has been a useful concept to address forms of transnational political and economic integration around the globe, which emerged after the Second World War and have been strengthened in the West since the 1990s. Some of these transnational structures have been invested with refined mechanisms of governance and decision-making that are similar to the ones found within domestic constitutionalism. The gradual emergence of the European Union is the most illustrative example of how cosmopolitan law has slowly acquired constitutional features in the past decades. However, different contexts have given rise to different forms of cosmopolitan constitutionalism. As a consequence of this fact, cosmopolitan constitutionalism necessarily describes a different phenomenon in Latin American constitutionalism than when applied to European law.

The regional political integration among Latin American democracies has not reached a level comparable to that of European law. Many Latin American countries still tend to adopt a very provincial approach to policy fields like the protection of the environment and the establishment of regional security policies. This provincial approach has prevented these policy fields from developing a more cosmopolitan perspective.[15] Regarding environmental policy, for instance, the Brazilian government, which has authority over most of the Amazon rainforest,

[15]On how this is related to methodological problems within the relationship between international and domestic law, see: Ernst Ulrich Petersmann, Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law (Oxford, Portland: Hart Publishing, 2017).

has traditionally refused to share the protection against deforestation with international institutions and, most recently, has even refused to accept foreign funds, expertise and surveillance of the area.[16] This refusal to share the task of protecting the area, which cannot be done using domestic resources alone, is just one example of how insular constitutionalism hinders the development of multilevel governance structures in the region.

Although many fields of research are not yet amenable to study under cosmopolitan frameworks, there is at least one field of research where the opposite is true: the protection of human rights and constitutional rights in Latin America. Since the late 1980s, different factors like the democratization of Latin American countries and the liberalization of their economies have increased the interaction between domestic and international authorities for the protection of human and constitutional rights in the region. Due to this new form of interaction between national and international human rights law, this study will focus on the contemporary form of human rights enforcement in Latin America as a special type of cosmopolitan constitutionalism. More specifically, this special type of cosmopolitan constitutionalism involves the study of the adjudication of human and constitutional rights within Latin American constitutionalism. As this study will explain, the cosmopolitanization of human rights protection has involved bottom-up and top-down elements.[17] The most salient element in top-down cosmopolitan constitutionalism has been the emergence of strong inter-American judicial review, which is the main concern of this study. In order to provide the best theory for the practice of inter-American judicial review, this study adopts descriptive and normative approaches.

The descriptive parts mostly involve the analysis of domestic and international documents that attest to the emergence of Latin American cosmopolitan constitutionalism with regard to human rights protection. These parts aim to better understand the context in which inter-American judicial review has emerged. To describe this context, this study will try to trace the top-down and bottom-up elements that were responsible for the current intimate relationship

[16]The most illustrative example comes from the domestic management of the Amazon Fund. Countries like Norway and Germany, which were the biggest donors to this fund, stopped sponsoring the protection against deforestation due to its current non-transparent management. This was due to the fact that the current Bolsonaro's administration terminated the previously successful managing committees on April 11, 2019 by issuing a decree.

[17]Samantha Besson has called attention to the transnational character of human rights law, which involves top-down and bottom-up relationships. For her, domestic and international human rights norms "are not only situated in a relationship of top-down transposition and/or enforcement of an international standard in domestic law, but also in a relationship of bottom-up international recognition and consolidation of the transnational or common law stemming from different domestic legal orders into an international standard." Samantha Besson, "Human Rights as Transnational Constitutional Law," in *Handbook on Global Constitutionalism*, eds. Anthony Lang, Antje Wiener, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2017), 234-247, 237. This is especially true regarding the evolution of human rights law in Latin America.

between domestic and international law within the IAS. Most of these elements refer to the increasing authority of international human rights law within domestic law. From a bottom-up perspective, for instance, this increasing authority has been documented in the texts of the most recent Latin American constitutions. The descriptive parts also involve analyzing how concepts, many of them offered by legal scholars, have changed lawmaking and legal interpretation within Latin American constitutionalism. This could be called the *descriptive-normative* dimension of law, given that legal scholars have simultaneously described and tried to guide the work of legal and political authorities by offering new jurisprudential approaches. One example comes from the concept of transformative constitutionalism as applied to Latin American constitutional orders. This concept has incorporated the idea that socioeconomic rights should be judicially enforceable within domestic law, which has substantially changed the constitutional adjudication of these rights in countries like Brazil and Colombia.

The normative parts have mostly involved arguing for the legitimacy and effectiveness of inter-American judicial review. Most importantly, it has involved the search for the best possible approach to inter-American judicial review, i.e., the most legitimate and effective approach. Although this study advocates for a context-specific theory of inter-American judicial review, it does not ignore the value of comparative scholarship. In line with this, the study compares inter-American with European human rights jurisprudence within its search for the best normative approach to inter-American judicial review. This comparative analysis is useful for Latin American lawyers due to the much more extensive experience with regional human rights enforcement in Europe. This study argues that this experience with regional human rights enforcement can be instructive for Latin American authorities and legal scholars. However, they do not necessarily need to import all jurisprudential elements of European human rights practices as an irrefutable truth and should always try to check if the elements of European human rights jurisprudence are compatible with the Latin American human rights enforcement context.

Brazilian law has been chosen as the case for studying the concrete questions regarding inter-American judicial review. This study introduces the normative questions inherent in the practice of inter-American judicial review with specific references to the case of the IACtHR's invalidation of the Brazilian amnesty law. Brazilian laws are also used as a practical test of the context-based theory of inter-American judicial review that this study aims to offer. There were two decisive reasons for picking Brazilian law as a case of study for inter-American judicial

review. First, this study has opted to focus on just one of the many Latin American constitutional orders under the authority of the IACtHR in order to describe the concrete consequences of inter-American judicial review for domestic constitutional law in Latin America. Second, my years of academic studies in Brazil have enabled me to approach Brazilian constitutional law with much more interest and familiarity.

iii. Structure of the study

Part I will describe the context for the emergence of inter-American judicial review. This context represents a form of cosmopolitan constitutionalism in Latin America. Latin American cosmopolitan constitutionalism has been brought about by the emergence of top-down and bottom-up elements of positive human rights legislation and jurisprudence that transformed the relationship between domestic and international law with regard to the protection of human rights. Chapter I will describe these top-down and bottom-up elements in more general terms. The top-down elements refer to the organizational evolution of the IAS. From the bottom-up perspective, it is worth mentioning the adoption of new constitutional texts by national legislatures, and the adoption of innovative constitutional interpretations by courts that have strengthened the authority of international human rights law within domestic law. The convergence between these top-down and bottom-up elements has created a new context for human rights enforcement in Latin America, which has ultimately created the environment for the emergence of inter-American judicial review of domestic laws.

Chapter II will describe in more concrete terms the problems that inter-American judicial review may pose for domestic constitutional law. In order to assess these problems, this chapter focuses on the emergence and evolution of Brazilian cosmopolitan constitutionalism. The 1988 constitution and the subsequent amendments made to it were the main triggers for Brazilian cosmopolitan constitutionalism. After describing the general features of the 1988 cosmopolitan constitution, this chapter will focus on how cosmopolitan constitutionalism has worked in practice within Brazilian law. This mostly involves two basic attitudes that national authorities have adopted with regard to inter-American human rights jurisprudence: convergence or resistance. After analyzing some cases that reveal the transformative role of inter-American human rights jurisprudence towards domestic law, this chapter will address the resistance of the highest judicial authorities, i.e., the judges of the Brazilian constitutional court,

to enforcing inter-American human rights jurisprudence on amnesty laws. The IACtHR has twice invalidated the 1979 Brazilian amnesty law to date. Despite this fact, the Brazilian constitutional judges have refused to abide by inter-American jurisprudence and even reaffirmed the validity of the amnesty statute within the 1988 constitutional order, which represented a clear underenforcement of the ACHR and of the Brazilian cosmopolitan constitution.

Part II focuses on the IACtHR practice of international judicial review. Chapter III will address the emergence and evolution of two specific forms of inter-American judicial review: conventionality control and the direct enforcement of socioeconomic rights. Conventionality control involves the IACtHR's review of domestic legislation that violates civil and political rights, which are the only expressly mentioned rights in the text of the ACHR. The direct enforcement of socioeconomic rights is a more recent and emerging feature of inter-American human rights jurisprudence. It has still not led to a concrete case of domestic law review. Nevertheless, based on the evolution of inter-American case law on these rights, it is highly likely that the court will adopt this second specific form of inter-American judicial review.

Chapter IV will address the normative grounds for the practice of international judicial review, which involve the discussion of its legitimacy and effectiveness. This analysis draws heavily on the debate about domestic judicial review based on one important similar feature between the domestic and the international variants, i.e., inter-institutional interaction. When addressing this inter-institutional interaction, this study draws on the distinction between strong and weak judicial review. Strong judicial review means that courts authoritatively amend domestic laws, while within weak judicial review courts may defer to legislatures the final say on the validity of legislation. This chapter will try to better understand the legitimacy and effectiveness issues inherent in the practice of strong judicial review. More specifically, it will analyze the reasons that legal scholars have offered for courts reviewing legislation. After addressing the most compelling arguments in favor of the practice of strong judicial review, this chapter will address the critiques of inter-American judicial review and focus on a common point of these critical approaches. As it will become clear, most of these critical approaches suggest that inter-American judicial review has not been in accordance with the principle of subsidiarity that the IACtHR is obliged to follow according to the ACHR. Invoking the principle of subsidiarity, legal scholars have suggested that the IACtHR should adopt weaker forms of international judicial review.

In Part III, this study aims to find the most appropriate approach to inter-American judicial review. Chapter V focuses on the compelling idea of weakening inter-American judicial review by borrowing the concept of the national margin of appreciation as it has been applied within European human rights jurisprudence. The margin of appreciation represents the deferential attitude that the European Court of Human Rights (ECtHR) has adopted to the decisions made by national authorities with regard to human rights protection under the European Convention on Human Rights (ECHR). This chapter will compare European and inter-American human rights jurisprudence and analyze how European human rights jurisprudence can help legal scholars to rethink the practice of strong inter-American judicial review. Chapter V will argue for the necessity of a context-based theory of inter-American judicial review, which will be presented by the following Chapter VI.

Mixed-form inter-American judicial review tries to reconcile the practice of strong judicial review with the introduction of weak review into inter-American human rights jurisprudence. This study argues that the strong form should be limited to the IACtHR's review of domestic legislation pertaining to civil and political rights, while the weak form is more appropriate for cases involving socioeconomic rights. Part IV presents a practical test for the theory of mixed-form inter-American judicial review. Chapter VII will apply mixed-form inter-American judicial review to two Brazilian laws that relate to the different categories of rights that are central for this theory: the Brazilian amnesty law, which relates to violations of civil and political rights, and Constitutional Amendment No. 95 (CA 95/2016), which brings about violations of socioeconomic rights within Brazilian law. This chapter will advocate for the strong judicial review of the Brazilian amnesty law and for the weak review of CA 95. In doing so, this chapter intends to illustrate the usefulness of mixed-form judicial review firstly for inter-American human rights jurisprudence and secondly for Latin American cosmopolitan constitutionalism as a whole. As the conclusion of this study will argue, the practice of mixed-form inter-American judicial review can represent a step forward within the evolution of global constitutionalism in Latin America. Most importantly, mixed-form inter-American judicial review can become a powerful instrument against the insular evolution of domestic constitutionalism, which has traditionally ended up poorly in Latin American constitutional history.

PART I. SETTING THE SCENE

I. Latin American Cosmopolitan Constitutionalism

1.1. What is cosmopolitan constitutionalism? Blurring the lines between national and international law

Different meanings have been attributed to the word *cosmopolitanism*. It emerged in ancient Greek philosophy with Diogenes's answer to the question of his origins.[18] It gained prominence in Western philosophy again with Immanuel Kant, who referred to cosmopolitanism in many pieces of philosophical writing. Kant's essay on the perpetual peace is probably the most well-known document on the relationship between cosmopolitanism and law.[19] In fact, Kant's references to cosmopolitanism have given rise to many affirmative interpretations of cosmopolitanism. This can be observed in recent scholarship in different disciplines.

In philosophy, neo-Kantian scholars like Seyla Benhabib have described the emergence of cosmopolitan norms based on the principle of universal hospitality.[20] Kant's essay has also inspired social science scholars like Ulrich Beck, who advocated for the end of "methodological nationalism" in the social sciences based on the concept of cosmopolitanism.[21] In political theory, David Held has argued that cosmopolitanism is able to restructure the political

[18]"I am a citizen of the world," answered he. Diogenes Laertius, "Diogenes," in, *Lives of The Eminent Philosophers*, *VI*, 63; trans. Pamela Mensch, ed. James Miller, (New York: Oxford University Press, 2018), 269-297, 288.

[19]This is due to the fact that Kant proposed the integration of cosmopolitan law (*ius cosmopoliticum*) into the regulatory framework, which was basically composed by two types of norms at that time: national and international law. National law focused on citizens' rights within their original political community, while international law focused on the regulation of inter-state relationships. In this context, Kant proposed cosmopolitan law as the right of guests in a particular political community. Moreover, *ius cosmopoliticum* was also used by Kant within his conception of the international community as a federation of nations. See: Immanuel Kant, Zum Ewigen Frieden. Ein Philosophischer Entwurf, (Königsberg, 1795). More recently, Jürgen Habermas sought to offer a fundamental conceptual revision of Kantian cosmopolitanism. See: Jürgen Habermas, "Kant's Idea of the Perpetual Peace: At Two Hundred Years Historical Remove," in *The Inclusion of the Other. Studies in Political Theory*, eds. Ciaran Cronin, Pablo De Greiff (Cambridge: MIT Press, 1998), 165-201. For Habermas, "Kant's idea of a cosmopolitan order must be reformulated if it is not to lose touch with a global situation that has changed fundamentally." Ibid, 178.

[20]Seyla Benhabib, "The Philosophical Foundation of Cosmopolitan Norms," in *Another Cosmopolitanism*, ed. Robert Post, (New York: Oxford University Press, 2006), 13-44.

[21]Ulrich Beck, Der Kosmopolitische Blick oder: Krieg ist Frieden (Frankfurt am Main: Suhrkamp, 2004).

organization of national, regional and global institutions.[22] However, there have also been skeptical references to cosmopolitanism, in which scholars have interpreted this term in a very negative sense.[23] Danilo Zolo, for instance, has related cosmopolitanism to traditional forms of global domination throughout history.[24] Craig Calhoun has described the misleading conception of a world without borders that is shared by a cosmopolitan elite of frequent travelers.[25]

When legal scholars started using this word for their jurisprudential approaches to lawmaking and legal interpretation, they had different positive and negative senses of cosmopolitanism at their disposal. Most references to cosmopolitanism were naturally made within international law scholarship, given that this field of law and legal research stands close to the issues usually associated with cosmopolitanism by the other social sciences.[26] However, throughout the evolution of law and legal theory in the last decades, legal scholars stopped using cosmopolitanism for just describing international state relations. Some legal scholars started describing the relationship between national and international law with references to cosmopolitanism. This relationship is usually regulated by constitutional law, which gives us a sense of how these scholars have tried to grasp the new relationship between national and international law with innovative references to *cosmopolitan constitutionalism*. It is worth mentioning some of the studies that have adopted this approach. Two works were useful for the present study to describe the evolution of domestic and inter-American human rights law based on the concept of cosmopolitan constitutionalism: Alexander Somek's theory of the

[22]David Held, Democracy and the Global Order. From the Modern State to Cosmopolitan Governance, (Cambridge: Polity Press, 1995).

[23]In philosophy, Karl Marx and Friedrich Engels have most prominently used this word in a very negative sense: "The bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country;" "[F]inancial swindling celebrated cosmopolitan orgies;" "The Second Empire had been the jubilee of cosmopolitan blackleggism." All these quotes are from: Karl Marx, Friedrich Engels, Manifesto of the Communist Party, trans. Samuel Moore, Friederich Engels, 1848, available at: https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf.

[24]Danilo Zolo, Cosmopolis. Prospects for World Government, trans. David McKie (Cambridge: Polity Press, 1997).

[25]Craig Calhoun, "The Class Consciousness of Frequent Travelers: Towards a Critique of Actually Existing Cosmopolitanism," South Atlantic Quarterly 101, no. 4, (2003), 869-897. Calhoun has even associated Brexit with a form of protest against cosmopolitanism, see: Craig Calhoun, "Brexit is a Munity Against the Cosmopolitan Elite," New Perspectives Quarterly 33, no. 3, (2016), 50-58.

[26]Martii Koskenniemi has claimed that "[t]he men who set up international law as a professional (instead of an academic) enterprise, distinct from diplomacy, history and national law, were not internationalists. They were cosmopolitans." Martti Koskenniemi, "Legal Cosmopolitanism: Tom Franck's Messianic World," New York University Journal of International Law & Politics 35, (2003), 471-486, 473. Koskenniemi has reached the same Habermasian conclusion with regard to cosmopolitanism: "Today we know that something about the project of cosmopolitanism failed and that cosmopolitan lawyers have had to contend with what has seemed available: the diplomatic laws of sovereign equality." Ibid, 475.

cosmopolitan constitution and Mattias Kumm's legal cosmopolitanism as an integrated conception of public law.

For Somek, "the emergence of the cosmopolitan constitution represents a momentous transformation of modern constitutionalism," i.e., the cosmopolitan constitution "can be perceived as an outgrowth of modern constitutionalism."[27] He has claimed that the cosmopolitan constitution is the product of *constitutionalism 3.0* as the third stage of modern constitutionalism. This third stage is characterized by the struggle between the task of collective self-governance within the national realm, which marked *constitutionalism 1.0*, and the rational and universal orientation of human rights, which was the most salient feature of *constitutionalism 2.0*. The cosmopolitan constitution is marked by ambivalence because it is a constitution between the local and the universal.[28] Constitutionalism coped with this ambivalence by taking the "step from earning authority through practical reasons to earning it through mutual engagement."[29] For Somek, this explains the emergence of peer-review systems among liberal democracies in the 20th century. He has noted that the cosmopolitan constitution is a constitution constantly reviewed from the perspective of outsiders. For him, "[c]onstitutionalism 3.0 is about yielding, for the purpose of self-correction, to the judgement of one's peers. Foreigners are given voice. The relevance of foreigner or foreignness to one's own constitutional system is the defining characteristic of the cosmopolitan constitution."[30]

Somek has claimed that cosmopolitan constitutions possess some basic features like the recognition of human rights, the prohibition of discrimination based on nationality, and the virtual representation of foreigners in a specific political community.[31] These features are easily identifiable within constitutions under European law. In fact, it would not be wrong to infer that Somek's description of the cosmopolitan constitution lead, in practice, to a constitution similar to the ones found under European law.[32] This European pedigree of Somek's cosmopolitan

[27]Alexander Somek, "The Cosmopolitan Constitution," in *Transnational Law: Rethinking European Law and Legal Thinking*, eds. M. Maduro, K. Tuori, S. Sankari, (Cambridge: Cambridge University Press, 2014), 97-121, 108-109. A complete version of Somek's theory of the cosmopolitan constitution can be found in: Alexander Somek, The Cosmopolitan Constitution, (Oxford: Oxford University Press, 2014).
[28]For Somek: "Human rights are universal while a particular people are the negation of universality necessary for their realization." Alexander Somek, The Cosmopolitan Constitution, (book), 178.
[29]Ibid.
[30]Ibid, 183.
[31]Ibid, 176-243.
[32]One of his most recent pieces of writing on cosmopolitan constitutionalism is revealing of this European pedigree of the cosmopolitan constitution. See: Alexander Somek, "Die Nation und ihr Jenseits", in *Rechtsphilosophie zur Einführung*, (Hamburg: Junius Verlag, 2018), 193-223. Somek usually starts writing about general legal concepts and ends up addressing European law. In all his years of research in the United States, he kept on writing about constitutionalism in Europe. Somek is, first and foremost, a European lawyer and, by diving deep into European

constitutionalism is related to his traditional critique of European law, which is present in most of his books.[33] His approach to European law based on cosmopolitan constitutionalism was helpful for this study because it illustrates how it is possible for a lawyer to observe and criticize the relationship between national and international law within a specific legal context.

Cosmopolitan constitutionalism draws on the evolution of positive law as well as on how authorities and legal scholars describe and interpret this new reality of norms. Latin America has also seen the emergence of a new context for lawmaking and legal interpretation in recent decades. This is especially true with regard to the norms relating to human rights protection in the region. However, Latin American cosmopolitan constitutionalism clearly differs from European cosmopolitan constitutionalism. In Europe, there has been a well-known discussion about legal pluralism and multilevel constitutionalism, which represent more refined interpretations of the relationship between national and international law that are only possible within the European context.[34] This debate has drawn on the evolution of European law under the political agency of the European Union (EU) authorities and also on the consequent evolution of legal scholarship in this new and exciting context for lawmaking and legal interpretation. Mattias Kumm's theory of cosmopolitan constitutionalism is intimately related to this evolution of the relationship between national and international law under European law.

law, he reaches more insightful perspectives on general legal theory. Regarding the European pedigree of the idea of the cosmopolitan constitution, he has written: "Reduction is essential. Writing is all about pruning and discarding preliminary drafts. Yes, the book has a regional focus, but this focus is surprisingly accidental. What matters, at the end of the day, are the ideas." Alexander Somek, "Book Review. Blindness and Hindsight," German Law Journal 19, no. 6, (2018), 1557-1566, 1558.

[33]See: Alexander Somek, Individualism: An Essay of the Authority of the European Union, (Oxford: Oxford University Press, 2008); Alexander Somek, Engineering Equality: An Essay on European Anti-Discrimination Law, (Oxford: Oxford University Press, 2011).

[34]To give a few examples of this debate: Anne Peters, Elemente einer Theorie der Verfassung Europas, (Berlin: Duncker & Humblot, 2001); Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," Theoretical Inquiries in Law 8, (2007), 9-26. Ingolf Pernice, "The Treaty of Lisbon: Multilevel Constitutionalism in Action," Columbia Journal of European Law 15, (2009), 349-407; *The Constitutionalization of International Law*, eds. Jan Klabbers, Anne Peters, Geir Ulfstein (Oxford: Oxford University Press, 2009); *The Twilight of Constitutionalism*, eds. Petra Dobner, Martin Loughlin, (Oxford: Oxford University Press, 2010); Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (Oxford: Oxford University Press, 2010); *Constitutional Pluralism in the European Union and Beyond*, eds. Matej Avbelj, Jan Komárek, (Oxford, Portland: Hart Publishing, 2012); Dieter Grimm, Die Zukunft der Verfassung II, Auswirkungen von Europäisierung und Globalisierung, (Frankfurt am Main: Suhrkamp, 2012); *Transnational Law: Rethinking European Law and Legal Thinking*, eds. Miguel Maduro, Kaarlo Tuori, Suvi Sankari, (Cambridge: Cambridge University Press, 2014); *Research Handbook on Legal Pluralism and EU Law*, ed. Gareth T. Davies, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2018); Matej Avbej, The European Union under Transnational Law: A Pluralist Appraisal, (Oxford, UK: Hart Publishing, 2018).

Kumm has described cosmopolitanism as an "integrated conception of public law."[35] For him, the cosmopolitan turn in constitutionalism has led to a framework of norms in which the strict lines between national and international law, which have long dominated the field of research, have been blurred.[36] In this new context, the main challenge for authorities and scholars is to try to offer globally legitimate grounds for the exercise of public power. He is strongly against a statist interpretation of the relationship between domestic and international law and has argued that both types of law have much more in common than some legal scholars and authorities want to admit.[37] However, he is also against a simple monist conception of the relationship between domestic and international law and has argued for a refined conception of constitutional pluralism in which different legal systems can make claims to authority.

Despite his refined model of constitutional pluralism, Kumm has argued that national and international law possess structural connections that can lead to a common conceptual framework for global public law. This common framework means that national and international law can be "mutually supportive and complementary."[38] For him, legal scholars and authorities should try to make sense of this new reality for norms and develop new normative approaches that can address this complex framework for justifying the exercise of power. They should stop searching for clear hierarchical structures between domestic and international law and accept the deeply pluralist structure of public law, offering normative interpretations that can fit into this context. It is based on this interpretation of the relationship between domestic and international law that he has proposed concepts like the "justice-relevant negative externalities"[39] that domestic states may produce to each other and argued that only a cosmopolitan state is legitimate in the eyes of the international community when trying to solve issues like these.

In conclusion, the value of approaches to cosmopolitanism coming from legal scholars lies not in their search for the definitive meaning of this word. Their value, at least for this

[35]Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law," Indiana Journal of Global Legal Studies 20, no. 2, (2013), 605-628.
[36]"National and international and international law form an integrative whole." Ibid, 612.
[37]Kumm has referred to the distinction between "Big C" constitutionalism with regard to the domestic realm, and "small c" constitutionalism regarding international law. For him, this distinction does not satisfy either side. On this point, see: Mattias Kumm, "The Best of Times and the Worst of Times. Between Constitutional Triumphalism and Nostalgia," in *The Twilight of Constitutionalism*, eds. Petra Dobner, Martin Loughlin, (Oxford: Oxford University Press, 2010) 201-219.
[38]Kumm, The Cosmopolitan Turn in Constitutionalism, 612.
[39]"There can be no self-standing national constitutional legitimacy because the practice of constitutional self-government within the framework of the sovereign state raises the problem of justice-relevant negative externalities." Ibid. See his concept of justice-relevant externalities in: Ibid, 617-624.

study, lies in the capacity to both describe and criticize the relationship between national and international law within a specific legal system. The major challenge of the following descriptive parts is to explain how the new context for human rights enforcement in Latin America can be described as a type of cosmopolitan constitutionalism, which has enabled inter-American judicial review of domestic law to emerge. This task involves questions like: How could lawyers describe Latin American constitutions as cosmopolitan constitutions? What consequences does this new narrative have for the relationship between national and inter-American human rights law in Latin American countries? This study will address these questions in the following sections.

1.2. Integration through human rights law in Latin America

How could legal scholars refer to Latin American constitutionalism if Latin American countries are so different to each other? One plausible answer is the common past that these countries share. Colonization, African slavery, the massacre of indigenous people, revolutionary independence and the frequent rule of authoritarian regimes: All these factors took part in the history of most Latin American countries. When addressing this history, lawyers realize that the most integrative factor among these countries is the difficult evolution of liberal constitutionalism in the region since its beginnings.[40] The evolution of Latin American constitutionalism has always been followed by inherent contradictions. For instance, many Latin American countries adopted their first constitutions in the 19th century but kept the institution of slavery within domestic law. The troubling past has had consequences for the evolution of constitutionalism to date. Latin American countries had to cope with this difficult past and this reveals a convergence in the evolution of constitutionalism at the domestic level.

Despite this common history and its converging elements, the emergence of Latin American cosmopolitan constitutionalism is brought about by more recent top-down and bottom-up elements relating to human rights legislation and jurisprudence in the region.[41] The

[40]See: Roberto Gargarella, Latin American Constitutionalism. 1810-2010, (Oxford et al.: Oxford University Press, 2013).

[41]This study has already referred to Samantha Besson's concept of human rights as transnational constitutional law, which involves top-down and bottom-up relationships. Yoon Jin Shin has offered a practical example of these relationships. She has written about bottom-up cosmopolitan constitutionalism regarding South Korean law. See: Yoon Jin Shin, "Contextualized Cosmopolitanism: Human Rights Practice in South Korea," Discussion Paper: Center for Global Constitutionalism, (Berlin: 2017). Later, she has addressed the same issue as bottom-up elements of global constitutionalism: Yoon Jin Shin, "Cosmopolitanising Rights Practice. The Case of South Korea," in *Global Constitutionalism from European and East Asian Perspectives*, eds. Takao Suami et al. (Cambridge:

top-down elements involve the organizational evolution of the Inter-American System for Human Rights Protection (IAS), while the bottom-up elements involve the higher authority that human rights currently enjoy within domestic law in many Latin American countries. Both bottom-up and top-down elements have strengthened the integrative force of human rights law in Latin America, which is responsible for a more intimate relationship between domestic and international law within the IAS.[42] It is important to stress that this study focuses on a type of regional integration that does not necessarily refer to a more ambitious ideal of regional political unity as the one present in Europe. In contrast to cosmopolitan constitutionalism in Europe, the Latin American version is limited to the evolution of human rights legislation and jurisprudence at the domestic and inter-American levels within the IAS.[43]

Nobody can deny that the level of legal and political integration among Latin American democracies did not reach a comparable level to that of European law and that this is even something unimaginable in the near future. The ideal of regional political unity of Latin American countries was once enthusiastically defended by Simon Bolivar, who believed that only a stronger cooperation between these countries could lead to the end of colonial ambitions towards the region. This study does not share Bolivar's ideals,[44] i.e., it does not see law as an integrational tool that could be useful for regional political unity in Latin America. Latin American cosmopolitan constitutionalism is restricted to human rights protection and to the changing relationship between national and international law that has been brought about by human rights law within the IAS. Human rights legislation and jurisprudence are the most important, and for this study, the only triggers for the emergence of Latin American cosmopolitan constitutionalism.

Cambridge University Press, 2018), 1-26. Both authors are good examples of how legal scholars can describe cosmopolitan constitutionalism based on these bottom-up and top-down relationships between domestic and international authorities.

[42]Flávia Piovesan, "Fuerza Integradora y Catalizadora del Sistema Interamericano de Protección de los Derechos Humanos: Desafios para la Formación de un Constitucionalismo Regional," in *La Justicia Constitucional y su Internacionalización. ¿Hacia un Ius Constitucionale Commune en América Latina?, Vol. II*, eds. Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, (Ciudad del Mexico: Universidad Nacional Atónoma de México, 2010), 431-448.

[43]This is the difference between *integration through law* in Europe and *integration through human rights law* in Latin America. The literature on integration through law in Europe is vast. On the evolution of this debate, see, for instance: *The Transformation of Europe. Twenty-Five Years On*, eds. Miguel Poiares Maduro, Marlene Wind, (Cambridge: Cambridge University Press, 2017).

[44]In fact, *bolivarianism* currently translates a very negative sense in the region since its last enthusiastic advocate was no one less than an authoritarian politician, namely Hugo Chaves. Chaves often claimed to be inspired by Bolivar's ideals and called his government a Bolivarian revolution. On Bolivarian constitutionalism, see: Mark Tushnet, "The New 'Bolivarian' Constitutions: A Textual Analysis," in *Comparative Constitutional Law in Latin America*, eds. Rosalind Dixon, Tom Ginsburg, (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2017), 126-152.

It is true that integration through human rights law presupposes a certain level of regional political convergence, given that it relies on international institutions for human rights enforcement in Latin America. It was the political commitment of national authorities that gave rise to these international institutions. Political convergence is also present in the adoption of several inter-American treaties and conventions. Even though the debate of regional integration through human rights law should not ignore its inherent political side, Latin American political unity does not stand on the focus of this study. It is the regional integration through human rights law that offers the basis for the emergence of Latin American cosmopolitan constitutionalism. As mentioned, this type of regional integration refers most importantly to more recent development in human rights legislation and jurisprudence at the domestic and inter-American levels within the IAS, which will be addressed in the following.

1.3. Top-down and bottom-up cosmopolitan constitutionalism in Latin America

Integration through human rights law in Latin America enables lawyers to describe the relationship between domestic and inter-American human rights law as a type of cosmopolitan constitutionalism. There are two different types of elements responsible for the emergence of Latin American cosmopolitan constitutionalism. First, there are elements at the regional level of human rights protection that have influenced the stronger relationship between domestic and inter-American human rights law. Second, there are elements at the domestic level of constitutional lawmaking that have strengthened the authority of human rights within domestic law. Both cannot be distinguished too sharply, since the regional level has influenced the domestic level and vice-versa. Nevertheless, it is worth analyzing them separately in order to better describe the emergence of Latin American cosmopolitan constitutionalism.

The regional elements of human rights enforcement relate to the organizational evolution of the IAS. This evolution has involved important political factors and, more recently, important jurisprudential factors pertaining to human rights protection in Latin America. It is possible to describe these elements as examples of top-down cosmopolitan constitutionalism in Latin America, since they first emerged at the inter-American level. These top-down elements of cosmopolitan constitutionalism include the institutional evolution of the Inter-American Commission of Human Rights (IACHR) and, most importantly for this study, of the Inter-

American Court of Human Rights (IACtHR). The top-down emergence of cosmopolitan constitutionalism was only possible due to its corresponding bottom-up evolution. This bottom-up evolution involves the higher authority of human rights within domestic law, which has been established by national legislatures and the highest domestic courts.

The following sections will describe the top-down and bottom-up emergence of Latin American cosmopolitan constitutionalism. First, the institutional evolution of the IAS will be described. Then, this chapter will describe the bottom-up elements of cosmopolitan constitutionalism by analyzing the adoption of new Latin American constitutions and how they have strengthened the authority of human rights law within domestic law. Finally, this chapter will also describe how domestic courts were responsible for the bottom-up evolution of cosmopolitan constitutionalism in Latin America since they have established a higher authority of international human rights documents within national law by means of constitutional interpretation.

1.3.1. The top-down emergence of cosmopolitan constitutionalism

The top-down emergence of Latin American cosmopolitan constitutionalism refers to the institutional evolution of the IAS. The work of the inter-American human rights commission (IACHR) is a fundamental element of top-down cosmopolitanism, but this study does not address it at length. There are some reasons for this approach. The most decisive reason for not fully addressing the work of the IACHR is that this would not be useful for the normative approach this study wishes to adopt toward inter-American judicial review of domestic law. In line with this, this study will focus on the IACtHR and address the most salient normative questions relating to the evolution of inter-American human rights jurisprudence. For this task, an analysis of the IACHR is of secondary importance. Nevertheless, the IACHR's work will not be completely ignored. There are mentions of the IACHR reports on the human rights situation in specific Latin American countries and the IACHR is also included as a fundamental institution for human rights enforcement in Latin America in several parts of this study. Hence, the following section about the top-down cosmopolitan elements are focused on the institutional evolution of the IAS, with a particular emphasis on the increasing authority of the IACtHR.

1.3.1.1. The Inter-American Human Rights System (IAS)

A brief description of the IAS is necessary in order to understand the institutional context of the contemporary regional integration through human rights law in Latin America. There is no scope within this study for an extensive historical description of the organizational evolution of the IAS, which was brought about by the political agency of the Organization of American States (OAS). However, some historical elements will be mentioned as long as they still relate to the contemporary form of human rights practices within the IAS.

Bolivar's ideal of a confederation of independent Latin American republics was doomed to fail,[45] although other forms of regional integration came to prominence in the Americas in the end of the 19th century. Political integration gained more emphasis only in the post-war period of the 20th century. The 9th Conference of Bogotá was an important historical point, because it was responsible for the foundation of the OAS. The OAS has represented the accomplishment of a more mature level of institutional integration in the hemisphere. It was created by the Charter of Bogotá in 1948 as a regional agency within the United Nations and with similar purposes as an international organization at the regional level: to strengthen peace and security, and to promote economic, social, and cultural development in the Americas.[46] Another important document adopted in the Bogotá Conference was the American Declaration on the Rights and Duties of Man,[47] which was the first document on human rights adopted by an interstate organization, prior even to the Universal Declaration of Human Rights, which came just months later.

[45]Bolivar's ideal led to the First Congress of American States in Panama in 1826, where the Treaty of Perpetual Union, League and Confederation was adopted, which was an ambitious pact that established a military and mutual defense pact, including even a supranational parliamentary assembly. This treaty was ratified by only one state at that time, Gran Colombia itself. For a more detailed account of these initial forms of political integration in the Americas and how they eventually led to the adoption of the American Convention on Human Rights, see: A.H. Robertson, J. G. Merrils, "The American Convention on Human Rights," in *Human Rights in the World. An Introduction to the Study of the International Protection of Human Rights*, 4th ed. (Manchester, New York: Manchester University Press, 1996), 197-237.

[46]Art. 4 of the original text of the Charter of the OAS. The current OAS Charter was amended by the Protocol of Buenos Aires (1967), the Protocol of Cartagena das Indias (1985), the Protocol of Washington (1992), and finally by the Protocol of Managua (1993).

[47]The American Declaration on the Rights and Duties of Man was adopted on May 1948.

The organizational evolution of the OAS has been followed by the adoption of several important protocols, conventions and treaties by its member states. The American Convention on Human Rights (ACHR) is the most important general human rights document adopted by the OAS member states. The ACHR, which is also known as the Pact of San José, was adopted in 1969 and it is the founding document of the IAS.[48] It was mostly inspired by the American Declaration of 1948, the European Convention on Human Rights (ECHR) of 1950 and the International Covenant on Civil and Political Rights of 1966. The ratification of the ACHR is not mandatory to be granted membership within the OAS, which represents one important difference to the European system for human rights protection. It is also possible that OAS member states ratify the ACHR and refuse the authority of the IACtHR, which represents another important difference between the European system and the IAS.[49]

The ACHR lists in its first part (Arts. 3 to 25 ACHR) a series of rights to be protected by the IAS member states.[50] In its catalogue of rights, the ACHR focuses on individual civil and political rights such as the right to personal liberty, a fair trial, privacy, property, and freedom of conscience, religion, thought, expression, and association. The ACHR also prohibits discrimination, slavery and establishes children's rights and the right to family life.[51] The ACHR does not explicitly mention socioeconomic rights, but it establishes in its Art. 26 that member states must progressively achieve "the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards" set forth in the Charter of the OAS.[52] The original text of the ACHR has never been amended,[53] but it has been supplemented

[48]The ACHR was signed on November 21, 1969, entering into force with the deposit of the eleventh necessary ratification in 1978.

[49]Amaya Úbeda de Torres, when referring to the IAS, claimed that: "The main reason for the difference between this system and the European one, however, lies in the fact that the American States are not ready to make court control fully operational." Amaya Úbeda de Torres, "The Optional Contentious Jurisdiction of the Court," in *The Inter-American Court of Human Rights. Case Law and Commentary*, eds. Laurence Burgorgue-Larsen, Amaya Úbeda de Torres (Oxford: Oxford University Press, 2011), 4-23, 8. Despite not comparing the structure of these regional systems, some differences between them will be pointed out especially with regard to international human rights jurisprudence.

[50]There are many useful commentaries on the ACHR. See, for instance: *Convención Americana sobre Derechos Humanos. Comentario*, eds. Christian Steiner, Mari-Christine Fuchs, 2nd ed. (Bogotá: Konrad Adenauer Stiftung, 2019).

[51]Cecilia Medina Quiroga has noted that the ACHR's rights catalogue differs from other general human rights treaties due to its most recent date: "As the Convention is one of the most recent general treaties on human rights, the drafters were not only able to use the textual models of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention but were also able to examine the practice of the European system, which began functioning in 1953. In addition, the rights are drafted in such a way that from time to time they allow for the traditions and idiosyncrasies of the OAS Member States to be seen." Cecilia Medina Quiroga, The American Convention on Human Rights. Crucial Rights and their Theory and Practice, 2nd ed. (Cambridge et al.: Intersentia, 2016), 9.

[52]ACHR, art. 26.

[53]Sergio García Ramirez has mentioned the reluctance to change the original text of the ACHR: "There is resistance to 'open up the Convention,' which involves greater risks." Sérgio Garcia Ramirez, foreword to *The Inter-*

by two important Protocols: the Protocol of San Salvador,[54] which focus on the protection of socioeconomic rights, and the Protocol to Abolish the Death Penalty in the Americas.[55]

Although the ACHR represents the most important general human rights document, it is worth remembering that it is not the sole human rights document adopted by the IAS member states. Other specialized treaties and conventions take part on the contemporary inter-American *corpus iuris*, which includes, for instance, the Convention of Eradication of Violence against Women, the Convention on Forced Disappearance of Persons, and the Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities.

The second part of the ACHR is responsible for the structure of the IAS, which is composed of two main institutions: The Inter-American Commission on Human Rights, IACHR (Art. 32 ACHR), and the Inter-American Court of Human Rights, IACtHR (Art. 33 ACHR). The interaction between both organs is meant to monitor human rights enforcement in the Americas and hold states accountable in case of violations of the ACHR. This interaction between commission and court has changed throughout the organizational evolution of the IAS. The IACHR existed decades before the ACHR entered into force, created by a resolution of foreign ministers at a 1959 Conference held in Santiago. It later became a statutory organ of the OAS,[56] and finally the most immediate authority for human rights protection within the IAS. This particular history of the IACHR caused some institutional problems regarding its competences due to its already existing powers and functions before the establishment of the IACtHR.[57] This would later affect the beginning of the contentious jurisdiction of the IACtHR, since the commission had previously been responsible for analyzing individual petitions of human rights violations and did not easily start reporting cases to the later established court.[58]

American Court of Human Rights, eds. Burgorgue-Larsen, Úbeda de Torres, (Oxford: Oxford University Press, 2011). By "greater risks," the former IACtHR Judge probably meant the existence of authoritarian governments in Latin America.

[54]The Protocol of San Salvador was adopted in 1988 and entered into force in 1999.

[55]The Protocol to the ACHR to Abolish the Death Penalty was adopted in 1990.

[56]Due to the amendment of the Charter of Bogotá by the Protocol of Buenos Aires in 1967, the IACHR acquired a very broad mandate. Its principal function became "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." Protocol of Buenos Aires, art.112.

[57]For some time, the IACHR worked under a double mandate: the one resulting from the ACHR and the one resulting from earlier Conferences held in 1959, 1965 and 1967 that were decisive to its authority in the pre-history of the IAS. In the first 20 years, the IACHR work was basically restricted to its old mandate.

[58]Thomas Buergenthal has addressed this initial institutional rivalry within the IAS. See: Thomas Buergenthal, "Remembering the Early Years of the Inter-American Court of Human Rights," New York University Journal of International Law & Politics 37, no. 2, (2005), 259-280.

The IAS is a product of the regional political integration in the Americas, which was enabled mostly by the political agency of the OAS. Since its initial decade (1980s), the IAS has experienced a successful development with regard to its institutional authority. Different circumstances have been responsible for this successful history. As Thomas Buergenthal has pointed out, at the time of the adoption of the ACHR, less than a half of the first eleven ratifying countries were led by democratically elected governments.[59] Buergenthal shares a common understanding that, with the wave of new democracies in Latin America since the late 1980s, it was possible for the IAS to gradually gain authority with the support of domestic democratic governments. However, this common narrative on the evolution of the IAS must be reviewed in some important points. It is true that, since the establishment of new democracies, Latin America has faced a renewed interest in human rights, which made the IACHR and the IACtHR become more influential institutions in the region. Yet, it is important to abandon the idealist narrative of Latin American governments as consistent human rights defenders and look for more plausible reasons for the IAS successful organizational evolution. The establishment of new Latin American democratic governments *per se* does not fully explain why the IAS has gained so much authority in the last decades. Even though democracies tend to strive for human rights enforcement, it is not self-evident that they will defer to the regional level of human rights protection, even after overcoming the rule of authoritarian governments at the domestic level.

Regional systems for human rights protection can be viewed as a consequence of the growing peer accountability that has taken the stage in international relations with the mediation of international law.[60] Human rights law was instrumental for this task of international relations and this fact calls for a more pragmatic interpretation of the evolution of the IAS. Paying attention to this increasing importance of peer accountability in international relations may offer a more adequate description of the organizational evolution of the IAS. Beth Simmons, for instance, has pointed out that peer accountability was not only restricted to human rights, but it could also be observed in other areas such as the control of armaments, trade policies and monetary relations in the 20th century.[61] This century has seen the legalization of international

[59]Thomas Burgenthal, foreword to *The Practice and Procedure of the Inter-American Court of Human Rights*, by Jo M. Pasqualucci, 2nd ed. (New York: Cambridge University Press, 2009). On this issue, see also: Cecilia Medina Quiroga, The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System, (Dordrecht: Martinus Nijhoff Publishers, 1988).
[60]See: Alexander Somek, "Peer-review," in *The Cosmopolitan Constitution*, (Oxford: Oxford University Press, 2014), 176-178.
[61]Beth A. Simmons, "Why International Law? The Development of the International Human Rights Regime in the Twentieth Century," in *Mobilizing for Human Rights. International Law in Domestic Politics*, (New York: Cambridge University Press, 2009), 23-56.

human rights systems, which led to the establishment of the contemporary regional human rights systems: the European, the IAS and the African system. The evolution of these regional systems happened not only as a consequence of national authorities becoming eventually convinced that human rights enforcement should be a priority after the rule of authoritarian regimes. In fact, the post-dictatorship environment in Latin America did not avoid that democratic authorities accepted some decisions taken during past dictatorships.[62]

Andrew Moravscki has also argued that domestic political costs were involved in the establishment of the regional systems for human rights protection.[63] State authorities ratified international treaties for human rights protection as a way to ensure the establishment of a more willing environment for their international relations with other countries in the region. These more pragmatic descriptions from Simmons and Moravscki seem to match the institutional evolution of the IAS.[64] It is worth remembering that representatives of important geopolitical powers in the region at the end of the 1970s, namely Argentina and Brazil, were at the start against the adoption of the ACHR, while other countries with a minor geopolitical influence like Costa Rica, Ecuador, Barbados, Haiti and Honduras were the first countries to ratify the human rights convention.[65] The IAS would experience a substantial growth of its authority in the region only in the late 1990s, when the most populated Latin American countries accepted the jurisdiction of the IACtHR, i.e., Brazil and Mexico. These two democracies in the region accepted the jurisdiction of the IACtHR only in 1998. The full integration of most of the OAS member states into the IAS has since then contributed to the contemporary relevance of inter-American institutions for Latin American constitutionalism.

Regarding the procedures of inter-American human rights protection, only member states and the IACHR are able to submit cases to the IACtHR. All cases are first dealt with by the commission before they can be referred to the regional court (Art. 44 ACHR). The ACHR

[62]As this study will later explain, the continuing validity of amnesty laws in Latin America has attested to this fact.
[63]Andrew Moravcski, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," International Organization 54, no. 2, (2000), 217-252.
[64]Par Engstrom and Courtney Hillebrecht have rightly noted that the organizational evolution of the IAS has "shaped and been shaped by geopolitics," i.e., it "has developed concurrently with other regional and international integration and institutionalisation efforts, as well as global shifts in human rights norms, practice and jurisprudence. The [IAS] has been one piece of an evolving human rights landscape, and while it has shaped what the landscape looks like, it, too, has been defined by these larger trends." Par Engstrom, Courtney Hillebrecht, "Institutional Change and the Inter-American Human Rights System," The International Journal of Human Rights 22, no. 9, (2018), 1111-1122, 1112.
[65]Cecilia Medina Quiroga has mentioned this episode in: Medina Quiroga, The Battle for Human Rights, 96. The American Convention was signed by 12 of the nineteen delegations present at the Conference in San José. First signatory states were: Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

does not allow individuals to directly claim the jurisdiction of the court.[66] The IACHR receives petitions against states lodged by individuals, groups or NGOs. The commission first tries to reach a friendly settlement of the case and, if this is not possible, it starts its quasi-judicial activities, which consist of establishing the facts and determining the direct human rights violations and the appropriate remedies.[67] The IACHR recommendations within its quasi-judicial powers are not legally binding, but they have played an important role within inter-American human rights enforcement. For the countries that have not accepted the jurisdiction of the IACtHR, the IACHR's political review is the only stage within the IAS. Moreover, the IACHR may review petitions against countries that have not yet ratified the ACHR based on the American Declaration of 1948, which is legally binding to all OAS member states.

As previously mentioned, the IACtHR was established with optional jurisdiction. The court has authority on advisory (Art. 65 ACHR) and contentious cases (Art. 61-63 ACHR). It may also issue provisional measures in case of serious human rights violations (Art. 64 ACHR). Until a considerable number of countries accepted its jurisdiction and the IACHR started to report cases to it, advisory case law represented most of the IACtHR activities within the IAS. A case is only reported to the IACtHR if the respondent state has accepted the regional jurisdiction of the IACtHR and if the IACHR concludes that the state has not complied with the issued recommendations.[68] In its contentious proceedings, the IACtHR assesses the evidence submitted and rules on the alleged violations of the ACHR. With the growing importance of its contentious jurisdiction within the IAS, the IACtHR has strengthened its authority over the IAS member states. Throughout the evolution of the IAS, the IACtHR has acquired jurisdiction over 20 of the 35 OAS member states.[69] Inter-American human rights jurisprudence is also relevant for states that have not accepted its authority since it affects the work of the IACHR, which has authority over all OAS member states. The United States, Canada and most of the English-speaking Caribbean countries have not accepted the IACtHR's jurisdiction, which currently

[66]This has caused debate on the IACHR's necessary scrutiny on reporting a case to the IACtHR. In the history of the IAS, Costa Rica has once tried to directly report the first contentious case to the IACtHR. In this first case, the IACtHR established that the commission's analysis is an essential feature of the IAS and reaffirmed the IACHR as the most immediate authority for the regional protection of human rights within the IAS. See: IACtHR, (Order of the President) July 15, 1981, *In the Matter of Viviana Gallardo*.

[67]The IACHR is also able to issue precautionary measures in case of serious and urgent situations with risk of irreparable harm.

[68]As Thomas Antkowiak and Alejandra Gonza have pointed out, the IACHR "transforms from a quasi-judicial body that assesses matters of fact and law to a 'procedural' party before the Court;" Thomas Antkowiak, Alejandra Gonza, The American Convention on Human Rights. Essential Rights, (New York: Oxford University Press, 2017), 10. They have also claimed that the IACHR functions similar to the *ministerio público* of some domestic constitutional orders in Latin America; Ibid, 11.

[69]They are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

makes the IACtHR an international human rights court for Latin American countries. Nowadays, despite several institutional difficulties,[70] the IACtHR has increased its authority within the IAS by means of substantive human rights case law that encompasses contentious cases, advisory opinions and provisional measures.

The IACtHR decides cases based on the ACHR and on the inter-American *corpus iuris*, which is composed by several human rights documents and, according to the IACtHR, also by inter-American human rights jurisprudence. International human rights legislation and jurisprudence have also been influential to inter-American human rights adjudication. The IACtHR has referred to documents from the universal system of human rights protection and also to traditional rules of interpretation of international law, which are present in instruments like the Vienna Convention on the Law of Treaties of 1963. Among international documents, the IACtHR has also consistently referred to declaratory instruments relating to international human rights enforcement like the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man.[71]

Another important distinguishing feature of the IAS lies in the wide variety of ordered reparations established by the IACtHR. According to Art. 63 (1) ACHR, if the IACtHR finds a violation of the ACHR, it can rule that this violation should "be remedied and that fair compensation [should] be paid to the injured party."[72] For Dinah Shelton, the ACHR gives the IACtHR "broad jurisdiction to decide on remedies," given that "the plain language of Article 63 indicates the Court's power to order remedies other than compensation."[73] In fact, the court has interpreted Art. 63 ACHR in order to issue an extensive catalog of reparatory measures: restitution, rehabilitation, satisfaction, and guarantee of non-repetition, in conjunction with pecuniary and non-pecuniary damages.[74] According to Art. 68 ACHR, respondent states

[70]See: Alexandra Huneeus, "The Institutional Limits of inter-American Constitutionalism," in *Comparative Constitutional Law in Latin America*, eds. Rosalind Dixon, Tom Ginsburg, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2017), 300-324.

[71]The court has also addressed the importance of international treaties for inter-American human rights jurisprudence, see: IACtHR, (Advisory Opinion OC-1/82) September 24, 1982, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights).*

[72]ACHR, art. 63 (1).

[73]Dinah Shelton, Remedies in International Human Rights Law, 3rd. ed. (New York: Oxford University Press, 2015), 228. She has claimed that "The drafting history of the American Convention reveals no debate about conferring broad competence on the Court. The early drafts generally replicated the language of Article 50 of the European Convention on Human Rights, but some states sought to strengthen this article." Ibid.

[74]Antkowiak and Gonza have claimed that the IACtHR "is the only international body with binding jurisdiction that has consistently ordered this full range of reparations. Especially noteworthy is the Tribunal's focus upon exacting non-monetary remedies, in direct response to victim's repeated petitions." Antkowiak, Gonza, The American Convention on Human Rights, 19.

undertake to comply with the judgement of the IACtHR in any case to which they are parties. However, the IACtHR, as usual for most international courts, has no effective mechanisms to enforce its decisions. The IACtHR relies on the domestic compliance with its decisions in order to ensure the effectiveness of inter-American human rights jurisprudence. This affects especially the effectiveness of the practice of inter-American judicial review of domestic laws as we will see.[75]

It is difficult for respondent states to fully comply with all the IACtHR ordered measures due to the extensive catalogue of reparations at its disposal. It is also no simple task to undertake an analysis of compliance rates within the IAS.[76] Legal scholars have usually relied on the compliance with judgement orders issued by the IACtHR and the decisions made by the highest domestic courts in order to present a more complete picture of compliance with inter-American jurisprudence.[77] Although there is no sanction for non-compliance with a judgement, the ACHR establishes that, in an annual report to the General Assembly of the OAS, the IACtHR must indicate cases in which a state has not complied and make pertinent recommendations on the matter (Art. 65 ACHR). This provision is supposed to submit states to a kind of political embarrassment in order to ensure compliance with inter-American jurisprudence. This could also be described as a political function of the IACtHR, which is intended to align domestic human rights practices with inter-American human rights law.

1.3.1.2. Inter-American judicial review as a top-down element of cosmopolitan constitutionalism

Inter-American human rights jurisprudence has become the most salient element in the evolution of top-down cosmopolitan constitutionalism in Latin America. The emergence of

[75]Chapter IV will especially refer to the IACtHR dependence on the implementation of strong inter-American judicial review by national authorities in order to guarantee its effectiveness within domestic law.
[76]The IACtHR recently published an overall analysis of its 40 years of jurisprudence that also brings interesting statistical information, see: *IACtHR. 40 Years Protecting Rights*, (Costa Rica: IACtHR, GIZ), available at: http://www.corteidh.or.cr/sitios/libros/todos/docs/40anos_eng.pdf.
[77]According to Jo M. Pasqualucci, there have been successful ordered compensations, but underenforced anti-impunity orders: See: Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, 7-8; On compliance with inter-American jurisprudence see: Damián González-Salzberg, "Complying (Partially) with the Compulsory Judgements of the Inter-American Court of Human Rights, in *Law and Policy in Latin America*, eds. Pedro Fortes et al. (London: Palgrave Macmillan, 2017), 39-56; Courtney Hillebrecht, Domestic Politics and International Human Rights Tribunals. The Problem of Compliance, (New York: Cambridge University Press, 2014); Courtney Hillebrecht "The Domestic Mechanisms of Compliance with International Human Rights Law: Cases Studies from the Inter-American Human Rights System," Human Rights Quarterly 34, (2012), 959-985.

inter-American judicial review of domestic law has been simultaneously an element in and a product throughout this phenomenon. As Dinah Shelton has described, "the IACtHR has made broad use of its jurisdiction. (…) Unlike the usual practice of the European Court, the [IACtHR] has ordered a state to take specific action to remedy a breach of the Convention."[78] This explains how extensive interpretations of some ACHR provisions like Arts. 2 and 63 (1) ACHR have served as a legal basis for the practice of strong inter-American judicial review of domestic laws in Latin America.

Two specific forms of strong inter-American judicial review can be described as salient elements in this top-down evolution of Latin American cosmopolitan constitutionalism: conventionality control and the direct enforcement of socioeconomic rights. The practice of conventionality control of domestic laws is related to the inter-American judicial enforcement of civil and political rights, which compose the majority of rights established by the ACHR. The direct enforcement of socioeconomic rights refers to the most recent IACtHR interpretation of the relation between the ACHR and other important inter-American human rights documents, more specifically the Protocol of San Salvador. Although this last form of inter-American judicial review has still not led to a concrete case of amendment of a domestic statute by the IACtHR, there is evidence that the IACtHR will start practicing the strong review of legislation on socioeconomic rights as Chapter III will explain.

The emergence of inter-American judicial review illustrates how the IACtHR has strengthened its authority over domestic constitutional orders. This court has empowered itself with consequences for the relationship between national and international law within the IAS. The most salient consequence has been that compliance with inter-American judicial review has promoted convergence between domestic and inter-American human rights law. This convergence illustrates how inter-American judicial review has become an agent of the evolution of cosmopolitan constitutionalism. However, it is worth remembering that the emergence of inter-American judicial review was only possible due to the already existent elements of cosmopolitan constitutionalism within the IAS. Given that describing the specific forms of inter-American judicial review already involves the normative questions pertaining to their practice, this study will address these specific forms more closely under Chapter III, and then study the normative grounds for their practice in Chapter IV.

[78]Shelton, Remedies in International Human Rights Law, 229.

1.3.2. The bottom-up evolution of cosmopolitan constitutionalism

The bottom-up evolution of cosmopolitan constitutionalism relates to the higher authority of human rights law within domestic legal systems in Latin America. In the first steps of the IAS, bottom-up cosmopolitan elements were restricted to the ratification of international human rights conventions by Latin American states. The ratification of the ACHR, for instance, was a prominent example of a bottom-up cosmopolitan element that strengthened the authority of inter-American human rights law within domestic law. More recently, though, there has been a stronger bottom-up evolution of Latin American cosmopolitan constitutionalism. In recent decades, domestic constitutional orders have changed their relationship with international law and, most importantly, with inter-American human rights law. The bottom-up elements of Latin American cosmopolitan constitutionalism refer mostly to these recent changes that have strengthened the relationship between domestic and inter-American human rights law. This has happened in a non-linear process and also in different ways in some Latin American countries.[79]

There are two most important types of elements worth mentioning. First, there was a wave of new constitutional texts in Latin America, especially after the 1990s. The adoption of new constitutions or even the amendment or reform of constitutional texts are among the first type of bottom-up cosmopolitan elements brought about by national legislatures in the region. A second type of bottom-up cosmopolitanism refers to human rights interpretation by constitutional courts and the interaction between national and international courts when resolving cases that involve human rights law.

1.3.2.1. Bottom-up cosmopolitanism and national legislatures

The first type of bottom-up cosmopolitan elements emerged by the adoption of new constitutions that changed the relationship between domestic and international human rights law. Several Latin American constitutional orders have strengthened their commitment to human rights protection. For Rodrigo Uprimny, "the openness of the domestic legal system to international human rights law, particularly the special and privileged treatment of human rights

[79]On this issue, see: *New Constitutionalism in Latin America. Promises and Practices*, eds. Detlef Nolte, Almut Schilling-Vacaflor, (Farnham: Ashgate Publishing, 2012).

treaties" was a common feature of these recent changes of Latin American constitutions.[80] For Mariela Morales Antoniazzi and Pablo Saavedra Alessandri, these constitutional changes illustrate a trend of *inter-americanization* of domestic constitutional practices, i.e., the adoption of opening clauses, which yield constitutional authority to human rights treaties or establish that domestic rights must be interpreted according to international human rights law.[81] Manuel Góngora-Mera has also pointed out that: "The general trend in Latin American constitutions during the past two decades has been the incorporation of human rights treaties into domestic law with 'special status'."[82] This study will now address this new form of constitutionalism in Latin America, which has been brought about by the work of national legislatures.

i) The adoption of new constitutions and their references to human rights law

The most recent constitution of Colombia is a first example of the transformation of the relationship between domestic and international human rights law in Latin America. Art. 93 of the 1991 constitution establishes that "all international treaties and conventions ratified by the Congress shall prevail in the domestic order" and that domestic fundamental rights should be interpreted in light of ratified international treaties.[83] Moreover, according to Art. 94, the rights established by the constitution and international treaties do not figure as a definitive catalogue of rights. They may be complemented by the rights inherent to the person, even if they are not explicitly mentioned in these documents.[84] It is also worth mentioning Art. 164 of the Colombian constitution, according to which this constitution grants priority to the analysis of the ratification of international human rights treaties by the government.[85]

According to the 1992 Constitution of Paraguay, constitutional law should enjoy higher authority than international treaties but these, in turn, enjoy a higher authority than ordinary

[80]Rodrigo Uprimny, "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges," Texas Law Review 89, (2011), 1587-1609, 1592.
[81]See: Mariela Morales Antoniazzi, Pablo Saavedra Alessandri, "Inter-Americanization. Its Legal Bases and Political Impact," in *Transformative Constitutionalism in Latin America*, eds. Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, (Oxford: Oxford University Press, 2017), 255-278.
[82]Manuel Eduardo Góngora-Mera, "The Block of Constitutionality as the Doctrinal Pivot of an Ius Commune," in *Transformative Constitutionalism in Latin America*, eds. Armin von Bogdandy et al., (Oxford: Oxford University Press, 2017), 235-253, 238.
[83]Constitution of Colombia, art. 93.
[84]Ibid, art. 94.
[85]Ibid, art. 164.

domestic law.[86] This constitution also establishes that the state "admits a supranational legal order that guarantees the validity of human rights, peace, justice, cooperation and development in the political, economic, social and cultural spheres."[87] Still according to this constitution, international human rights treaties may be denounced only through the procedures applied to constitutional amendments.[88] The 1999 Constitution of Venezuela establishes in its Art. 19 the obligation for domestic authorities to enforce human rights according to both the constitution and ratified international treaties.[89] Moreover, its Art. 23 establishes the constitutional hierarchy of human rights: "Treaties, covenants and conventions relating to human rights (…) have constitutional hierarchy and prevail in the domestic order," insofar as they contain more favorable norms than those established by domestic law.[90] This article also establishes the "immediate and direct application" of these documents by domestic "courts and other organs."[91]

According to Art. 11 (3) of the 2008 Constitution of Ecuador, "all rights and guarantees laid down in the Constitution and international human rights instruments are directly and immediately applicable by and before any and all public servants, judicial or administrative."[92] This constitution also establishes that the principles of "pro persona, least restrictive interpretation, direct applicability, and opening clause" must be applied to ratified international human rights treaties.[93] Moreover, it establishes in its Art. 424 that "international human rights treaties ratified by the State that afford greater protection than the Constitution shall prevail over all legal provisions or public acts."[94] Finally, the 2009 Bolivian constitution establishes in its Art. 13 (4) that international human rights guarantees have primacy over ordinary domestic law and that the rights and duties laid down in the constitution are to be interpreted in accordance with international treaties.[95] Moreover, Art. 14 (3) establishes that individuals and groups are ensured the free and effective exercise of the rights enshrined in the constitution, national laws and human rights treaties.[96] Article 256 refers to the primacy of international human rights documents when they declare rights more favorable than those of the constitution

[86]Constitution of Paraguay, art. 137
[87]Ibid, art. 145.
[88]Ibid, art. 142.
[89]Constitution of Venezuela, art. 19
[90]Ibid, art. 23.
[91]Ibid.
[92]Constitution of Ecuador, art. 11 (3).
[93]Ibid, art. 417.
[94]Ibid, art. 424.
[95]Constitution of Bolivia, art. 13 (4).
[96]Ibid, art. 14 (3).

and that the rights recognized in the constitution must be interpreted in agreement with international human rights treaties.[97] Although Art. 410 establishes the primacy of constitutional norms, it ranks international treaties above domestic law, granting international human rights treaties at least a supra-legal authority within domestic law.[98]

ii) The higher authority of human rights due to constitutional reforms or amendments

A new relationship between national and international human rights law has also been brought about by constitutional reforms or amendments carried out by legislatures in Latin America. A 1994 constitutional reform introduced Art. 75 (22) to the Argentinian constitution, according to which treaties and international agreements have primacy over domestic law.[99] This article mentions an extensive list of human rights treaties that "have constitutional hierarchy" but do not "derogate any article of the first part of this Constitution and should be understood as complementary to the rights and guarantees recognized by it."[100] Furthermore, this article establishes special procedures to pull out of human rights treaties and to ratify them in order that they acquire constitutional hierarchy within the Argentinean constitutional order.

In Mexico, the constitution was amended in 2011 in order to make an explicit reference to human rights at the beginning of the constitutional text. The reform modified the title of Chapter 1 of the constitution (from "Of the individual guarantees" to "Of human rights and their guarantees"), as well as modifying several other constitutional articles that address human rights. In its Art. 1, the Mexican constitution now reads that "individuals shall be entitled to the human rights granted by this Constitution and the international treaties to which Mexico is party, as well as the guarantees for their protection."[101]

[97]Ibid, art. 256.
[98]Ibid, art. 410.
[99]Constitution of Argentina, art. 75 (22).
[100]Ibid.
[101]Constitution of Mexico, art. 1. On the evolution of the protection of human rights in Mexico, see: José María Serna de La Garza, "The Protection of Human Rights," in *The Constitution of Mexico. A Contextual Analysis*, (Oxford: Hart Publishing, 2013), 163-192.

1.3.2.2. Bottom-up cosmopolitanism by means of constitutional interpretation

The second important type of bottom-up cosmopolitan elements can be observed in human rights interpretation and in the interaction between national and international courts when resolving cases that involve human rights law. The difference to the first type of bottom-up elements is that this second type does not necessarily involve the formal amendment of national constitutions by national legislatures. Legal authorities, more specifically courts, are the prominent actors of this second type of bottom-up evolution of Latin American cosmopolitan constitutionalism.

There are at least two different important trends when it comes to this type of bottom-up cosmopolitanism brought about by domestic courts. First, there is the interpretation held by the domestic highest courts of the hierarchy that human rights treaties should enjoy within domestic law. This has been a usual phenomenon within countries that do not clearly rank international human rights treaties in a specific position within national law or where recent constitutional amendments have changed the domestic authority of international treaties. A second important trend is the emergence of an inter-American framework for human rights enforcement, which can become an important reference point for rights adjudication within domestic law.

i) The constitutionalization of international human rights treaties by domestic courts

When the hierarchy of human rights treaties is not so clearly established by legislatures, it is up to judicial authorities to determine it. This has been the case in several Latin American countries, in which there is a lack of clear reference to the hierarchy of international human rights treaties within domestic law. This unclear reference led to what Manuel Góngora-Mera has described as the "judicial constitutionalization of human rights treaties."[102] For him, judicial constitutionalization describes a process through which an international human rights treaty acquires the normative rank of constitutional norms. There are basically two main consequences of this process. First, in cases of a norm conflict, the result may be that domestic statutes are

[102]Manuel Eduardo Góngora-Mera, Inter-American Judicial Constitutionalism. On the Constitutional Rank of Human Rights Treaties in Latin America Through National and Inter-American Adjudication, (San José, C.R.: Inter-American Institute of Human Rights, 2011), 84-120.

declared unconstitutional based on their incompatibility with international human rights law. In turn, the rights established by international treaties might gain direct effects when they become constitutional rights by means of domestic remedies such as constitutional writs.[103]

Góngora-Mera has underscored the importance of the *doctrine of constitutional block* and its consequences for constitutional adjudication in Latin America. This doctrine has been a prominent instrument for the constitutionalization of human rights treaties in some Latin American countries. According to it, courts may establish the constitutional authority of international human rights treaties based on the existence of a block of constitutional norms and principles, which encompasses domestic constitutional norms; and international human rights treaties, and declarations. For Góngora-Mera, "usually, the block of constitutionality encompasses the constitution *stricto sensu*, international declarations of human rights (…), and human rights treaties ratified by the state."[104] This constitutional block might be invoked in the constitutional review of domestic statutes as a parameter of constitutionality and in constitutional writs in cases of domestic violations of human rights.

The constitutionalization of international human rights treaties can be observed, for instance, in Panama. The Supreme Court of Panama established the constitutionalization of some international human rights provisions through the constitutional block doctrine. The Supreme Court granted constitutional rank to Art. 8 ACHR in a 1990 decision.[105] In several other decisions, it listed some international norms as figuring as standard for national constitutional review and progressively granted constitutional authority to international human rights documents. One example is a 1996 decision in which this supreme court included the Convention on the Rights of the Child into the constitutional block in Panama, arguing the absence of rights of children in the constitution. After the convention acquired constitutional authority, it was able to be enforced by writs of *amparo* within domestic law.[106]

It is important to notice that, in some countries, the evolution of the judicial constitutionalization of international human rights treaties has been non-linear. This can be illustrated by the case of Peru. In its 1979 constitution, human rights treaties had the same rank

[103]Góngora-Mera, The Block of Constitutionality as the Doctrinal Pivot of an Ius Commune, 237.
[104]Ibid, 238.
[105]Góngora-Mera, Inter-American Judicial Constitutionalism, 86.
[106]Ibid, 87. On the writ or action of *amparo* within Latin American constitutionalism, see: Allan-Randolph Brewer Carías, Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings, (Cambridge: Cambridge University Press, 2009).

of domestic constitutional norms, which represented a novelty in Latin America. According to Art. 101 of the old constitution, international treaties were a part of national law and in case of conflict between national and international norms, the later should prevail.[107] Moreover, Art. 105 established that human rights treaties could only be modified by means of constitutional amendments due to their constitutional rank within Peruvian law.[108] Later, the 1993 Constitution enacted under the authoritarian regime of Alberto Fujimori changed this constitutional rank of human rights treaties. The new 1993 text established a *deconstitutionalization* of human rights treaties, insofar as it established that international treaties were just "part of national law."[109]

As Góngora-Mera has explained, after the fall of Fujimori's regime, Peru's Constitutional Tribunal established the "reconstitutionalization of human rights treaties."[110] In a series of decisions, the newly independent court started to introduce important changes to the Peruvian constitutional order. Worth mentioning is the adoption of a Constitutional Procedural Code in 2004, according to which human rights treaties figure within the "block of constitutionality."[111] This new framework permitted this court to develop case law in favor of the application of human rights treaties within domestic law.[112] Since then, even though human rights treaties enjoy only a simple legal rank, the Peruvian court was able to include them among norms of the block of constitutionality, which deserve protection according to the "indirect contravention of the Constitution."[113] That is, despite not having a formal constitutional rank, human rights treaties might enjoy a higher authority in concrete cases.

A last example worth mentioning of how the process of constitutionalization of human rights treaties has been non-linear is the case of the Dominican Republic, where the Supreme Court of Justice introduced the writ of *amparo* into domestic law based on Arts. 8 and 25 (1)

[107]1979 Constitution of Peru, art. 101.
[108]Ibid, art. 105.
[109]"Treaties concluded by the government and now in effect are part of national law." 1993 Constitution of Peru, art. 55. Moreover, Art. 220 (4) includes treaties in the category of norms with simple legal rank: "The following are constitutional guarantees: (…) 4. The right of unconstitutionality, which takes effect against norms that have the status of laws: laws, legislative decrees, emergency decrees, treaties, congressional regulations, regional norms of a general nature, and municipal ordinances that infringe upon the Constitution in form or in substance." Ibid, art. 220 (4). Góngora-Mera has claimed that "[a]fter the self-coup (*autogolpe*) of President Alberto Fujimori, international human rights law and the inter-American system of human rights represented burdensome limits for the dictatorial actions of the government." Góngora-Mera, Inter-American Judicial Constitutionalism, 116.
[110]Góngora-Mera, Inter-American Judicial Constitutionalism, 119.
[111]Peruvian Constitutional Procedural Code, art. V of the Preliminary Title.
[112]Góngora-Mera, Inter-American Judicial Constitutionalism, 118.
[113]Peruvian Constitutional Procedural Code, art. 75.

ACHR in a 1999 decision.[114] For Góngora-Mera, this illustrated an increasing reception of human rights treaties at the domestic level.[115] This reception was later reaffirmed in decisions that ruled for the necessity to harmonize domestic laws with inter-American human rights law. In a 2004 decision this harmonization was declared with regard to a new Criminal Procedure Code.[116] The Dominican Supreme Court also established the binding character of inter-American human rights jurisprudence within domestic law. However, more recent decisions denied the prevalence of international norms over domestic law, i.e., the Supreme Court reviewed its broad reception of inter-American human rights jurisprudence. For Góngora-Mera, "[t]he facts that gave rise to this change are framed in the intricate and highly politicized issue of the situation of Haitian immigrants in the Dominican Republic."[117] He has claimed that the Supreme Court started adopting a resistant attitude to enforce inter-American human rights law after an IACtHR decision on the protected right of Dominican-born children of Haitian ancestry to nationality and education in the country. This evolution illustrates that domestic constitutional courts have held different interpretations of the authority of international human rights law within domestic law, despite the general trend towards the constitutionalization of international human rights treaties in the region.

ii) The inter-American framework for human rights enforcement

The common framework for human rights adjudication within domestic law has been brought about by the evolutive character of inter-American human rights practices. Both inter-American institutions are essential for this evolutive character of the inter-American framework for human rights enforcement. The states authorities might borrow quasi-jurisprudential (IACHR)[118] and jurisprudential expertise (IACtHR)[119] from the inter-American framework and adopt it as a meaningful reference point when deciding cases within domestic law. Particularly

[114]Góngora-Mera, Inter-American Judicial Constitutionalism, 87.
[115]Ibid, 88.
[116]Ibid.
[117]Ibid, 89.
[118]"[T]he Commission has built a large repertoire of mechanisms, including quasi-adjudication and mediation of friendly settlements; regular site visits to trouble spots throughout the region; and country reports." Par Engstrom, Courtney Hillebrecht, "Institutional Change and the Inter-American Human Rights System," The International Journal of Human Rights 22, no. 9, (2018), 1111-1122, 1115.
[119]For an extensive analysis of inter-American case law on different provisions of the ACHR, see: Thomas Buergenthal, Dinah Shelton, Protecting Human Rights in the Americas: Case and Materials (Strasbourg: International Institute of Human Rights, 1993). An updated version of inter-American case law analysis can be found in: Laurence Burgorgue-Larsen, Amaya Úbeda de Torres, The Inter-American Court of Human Rights. Case Law and Commentary, trans. Rosalind Greenstein, (Oxford: Oxford University Press, 2011).

important to bottom-up cosmopolitanism is the common framework that inter-American jurisprudence has represented to rights adjudication within domestic law. Countries with similar human rights violations might rely on this shared human rights expertise in order to align domestic constitutional practices with better practices of human rights enforcement. Even if subsidiary to domestic human rights enforcement, the inter-American framework has become a valuable source of human rights expertise for national authorities. Together with other regional systems and the universal system for human rights protection, inter-American human rights law is currently an important reference point for domestic rights adjudication in Latin American countries.

The usefulness of this inter-American framework involves compliance with inter-American jurisprudence on the part of national authorities. Just recently, the Grand Chamber of the Chilean Supreme Court demonstrated the value of the common framework for human rights adjudication in *AD 1386-2014*.[120] This case involved the criminal convictions against indigenous leaders under Chile's terrorist statute. In *Norin Catrimán v. Chile*,[121] the IACtHR had ordered national authorities to nullify all the effects of these criminal judgements within domestic law. The Chilean Supreme Court decided to guarantee the effectiveness of this IACtHR judgement within domestic law.[122] Most importantly, the Chilean court admitted the legitimacy of the practice of conventionality control, according to which national judicial authorities should review domestic legislation in case of conflict with inter-American human rights law.[123] By doing so, national authorities, most importantly domestic courts, become auxiliary bodies of the IACtHR. For Jorge Contesse, this decision "deserves praise because it affirms a domestic court's authority to declare itself an inter-American tribunal."[124] This interpretation of the complementary work between domestic courts and the IACtHR is illustrative of how the common framework for human rights enforcement might work in practice.

[120]Supreme Court of Chile, (Judgement) May 16, 2019, Case of *AD 1386-2014*.
[121]IACtHR (Judgement), May 29, 2014, Case of *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*.
[122]Supreme Court of Chile, (Judgement) May 16, 2019, Case of *AD 1386-2014*, §5.
[123]Ibid, §9.
[124]Jorge Contesse, The Supreme Court of Chile as an inter-American Tribunal, International Journal of Constitutional Law Blog, May 31, 2019, http://www.iconnectblog.com/2019/05/thesupreme-court-of-chile-as-an-inter-american-tribunal. For Contesse, "Chile's highest court has not only enhanced its own authority, but also that of the Inter-American Court's." Ibid.

It is important to emphasize that inter-American framework for human rights enforcement does not only refer to questions of mandatory compliance with the decisions ordered by the inter-American institutions. Another important point here is the voluntary use of this regional framework for domestic rights enforcement. One example is the voluntary compliance on the part of Argentinian authorities with inter-American jurisprudence on amnesty laws. In *Simón, Julio Héctor y otros*,[125] the Argentinian Supreme Court declared the invalidity of the *Ley de Punto Final* (Full Stop Law) and the *Ley de Obediencia Devisa* (Law of Due Obedience), which were enacted in the 1980s and had equivalent effects to amnesty laws in the country. The Argentinian Supreme Court established the invalidity of these laws based on the IACtHR invalidation of amnesty laws within Peruvian law. In *Mazzeo Julio Lilo y otros*,[126] the Argentinian Supreme Court invalidated a 1989 decree by President Menem also based on inter-American jurisprudence. The cases of *Simón* and *Mazzeo* illustrate the voluntary domestic compliance with inter-American human rights jurisprudence and demonstrate how influential the inter-American framework can be for the domestic authorities when engaging in constitutional adjudication. In a nutshell, this inter-American framework has become meaningful given that inter-American institutions have addressed systematic and traditional human rights violations in the region and sought for appropriate remedies for their non-repetition. National authorities should therefore not ignore this human rights expertise.

1.4. Conclusion: Latin American cosmopolitan constitutionalism as the scene for the emergence of strong inter-American judicial review

Although cosmopolitanism has a variety of meanings, cosmopolitan constitutionalism refers to the new relationship between national and international law that has emerged in different legal systems throughout the 20th century. In line with this, Latin American cosmopolitan constitutionalism can be a useful concept for describing the emergence of a new context for human rights enforcement in Latin America. Top-down and bottom-up elements have strengthened the authority of inter-American human rights law within domestic law and, ultimately, changed the relationship between domestic and international law within the IAS. In a nutshell, the top-down and bottom-up cosmopolitan elements have blurred the lines between

[125] Argentinian Supreme Court, (Judgement) June 14, 2005, Case of *Simón Julio Hector y otros*.
[126] Argentinian Supreme Court, (Judgement) July 13, 2007, Case of *Mazzeo Julio Lilo y otros*.

domestic and international public law within the IAS. These elements have ultimately given rise to the inter-American practice of judicial review of domestic laws.

The top-down cosmopolitan elements have included the organizational evolution of the IAS, with an emphasis on the increasing authority of the IACtHR. Although it is true that the establishment of new Latin American democracies has facilitated the organizational evolution of the IAS, this evolution is part of a larger trend of increasing peer-review in international relations throughout the 20th century. The initial steps within this evolution involved the adoption of the ACHR in 1969. However, the exponential increase in the IAS's authority is much more recent. The ACHR entered into force in the late 1970s, but countries like Brazil and Mexico only fully integrated into the IAS in 1998, when they finally accepted the contentious jurisdiction of the IACtHR. Given that only Latin American countries have accepted this contentious jurisdiction to date, the IACtHR currently functions as a Latin American court of human rights. In fact, in the past two decades, the IACtHR gained in authority due to the new context for human rights enforcement that emerged in Latin America. During this short period, the court has not missed the chance to become an influential institution in domestic constitutional orders and, by practicing inter-American judicial review of domestic laws, it has consolidated its authority within Latin American constitutionalism.

Bottom-up cosmopolitanism has involved the adoption of new constitutional texts by domestic legislatures, and the adoption of innovative constitutional interpretations by the highest domestic courts. One of the most salient features of recent Latin American constitutions is the privileged position that they conferred to human rights treaties within domestic law. National legislatures were not solely responsible for this bottom-up evolution of cosmopolitan constitutionalism. The most authoritative Latin American courts started adopting legal interpretations in favor of the stronger authority of international human rights law within domestic law. From the 1990s onwards, some courts started adopting the *constitutional block doctrine*, according to which international norms are included within the block of norms that are taken as a meaningful reference point for judicially reviewing domestic ordinary law. If domestic legislation is not in accordance with international provisions, domestic authorities can invoke the constitutional block and invalidate ordinary law based on this incompatibility. In conclusion, these most recent Latin American constitutions and innovative constitutional jurisprudence in the region point to the *inter-Americanization* of constitutional law in Latin America.

Latin American cosmopolitan constitutionalism brings about a new context for asking the normative questions that are inherently associated with the practice of judicial review. In fact, these normative questions become even more difficult to address in this new context. National legislatures and the highest courts in Latin America are, according to the ACHR, obliged to comply with inter-American human rights jurisprudence. However, judicial review of legislation has traditionally been under the authority of domestic courts in Latin America. More specifically, constitutional courts have been the most prominent judicial reviewers of legislation within Latin American constitutionalism. With the emergence of inter-American judicial review, these Latin American courts may now have a rival. In fact, there has been some cases in which the IACtHR has contested the decision of some of the highest Latin American courts with regard to the validity of domestic norms. Conflicting decisions on the validity of norms have become a fundamental issue within Latin American cosmopolitan constitutionalism, which indicates the need for a normative theory of inter-American judicial review.

As some scholars have noted, by practicing inter-American judicial review, the IACtHR has behaved like an international constitutional court for the Latin American countries under its authority.[127] However, this Latin American constitutional court was not established by any international treaty or convention among the IAS member states. Most importantly, this constitutional authority of the IACtHR was definitely not established by the ACHR. The IACtHR has practiced something similar to what in the European context Dieter Grimm has described as a "clandestine transfer of powers," which happened due to the European Court of Justice's extensive interpretation of European treaties.[128] Similar to Grimm's analysis of European law, the IACtHR has clandestinely taken the authority of constitutional courts to review domestic legislation. In view of this, the normative questions referring to the legitimacy

[127]For instance, see: Ariel E. Dulitzky, "An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights," Texas International Law Journal 50, no. 1, (2015), 46-93.

[128]See: Dieter Grimm, The Constitution of European Democracy, trans. Justin Collins, (Oxford: Oxford University Press, 2017). Grimm referred to the ECJ's decisions in *Van Geend en Loos v. Netherlands* (1963) and *Costa v. ENEL* (1964). In these judgements the ECJ established that community law had direct effects on and supremacy over domestic law, which Grimm has described as the *constitutionalization of European treaties*. For him, the most problematic issue is that this project of integration through law in Europe had "no critical bystanders," given that the Council of Europe is "no counterweight to the ECJ." Ibid, 9. In line with this, he argued that the ECJ's decisions caused a legitimation gap within the European Union, given that the Council, the Parliament and the members states cannot review ECJ's jurisprudence, and given that "[t]he ECJ, as a court, evades the question of democratically accountability entirely." Ibid, 13. In the end, he argued, the ECJ had blinded itself against politics. On this issue, see also: Dieter Grimm, "The Democratic Costs of Constitutionalization – The European Case," in Ibid, 81-104.

of inter-American judicial review are of high relevance for Latin American constitutional theory. Although several constitutions and courts have established new methods for enforcing inter-American human rights law within domestic law, inter-American judicial review has made the interaction between domestic and inter-American authorities much more complex. This can be more clearly illustrated with examples of the cosmopolitan relationship between national and inter-American human rights authorities. For the purpose of understanding this cosmopolitan relationship, it is better to focus on analyzing one of the Latin American constitutional orders and see how the practice of inter-American judicial review has affected the inter-institutional interaction between national and international authorities within the IAS. In the following chapter, this study will describe this cosmopolitan inter-institutional interaction by focusing on Brazilian constitutionalism.

II. The Brazilian Cosmopolitan Constitution

2.1. The bottom-up evolution of cosmopolitan constitutionalism in Brazil

Despite the geographical location of their country, Brazilians do not share a strong sense of Latin American identity. Throughout the centuries, different colonial histories have set the Portuguese- and Spanish-colonized countries apart from each other in the region. Different cultures and languages, and the continental dimensions of the Brazilian territory, with its population concentrated along the coast, were important factors that contributed to Brazil's exceptional status in Latin America. This Brazilian exception in the region offers a challenge when trying to situate Brazil within discussions about Latin America in any meaningful sense, given that the relations between the country and the region are not so self-evident.[129] Due to the increasing relevance of human rights enforcement in the region, the first task of this chapter is describing Brazil's integration through human rights law into Latin America.

The previous chapter has described Latin American cosmopolitan constitutionalism in general terms. The present chapter has two main objectives: addressing with greater attention the cosmopolitan relationship between domestic and inter-American judicial authorities and introducing in more specific terms the normative issues inherent in the practice of strong inter-American judicial review. First, it is worth describing more specifically what consequences this new Latin American context for human rights enforcement has for domestic constitutional practices. In order to fulfill this task, this chapter will analyze some Brazilian cases before the IACtHR and will flesh out the transformative role that these cases have played within domestic law. The key aspect of this descriptive approach is to demonstrate how this cosmopolitan relationship can enable different responses to traditional human violations in Brazil. As the last chapter has also emphasized, the inter-American framework for rights enforcement provided by inter-American jurisprudence can be useful for changing domestic practices of state authority. This study focuses on Brazil as an example of a Latin American constitutional democracy and asks how influential inter-American law has been in Brazilian legal practices. Related to this first question, it is worth addressing a second important point, i.e., how Brazilian case law has influenced inter-American human rights jurisprudence. These two questions guide this section of the study, which is focused on Brazilian legal cosmopolitanism. They are both

[129]Some universities have, for instance, a center for Latin American studies and another center for Brazilian studies.

related to the top-down and bottom-up evolution of cosmopolitan constitutionalism in Latin America.

Regarding the second task of this chapter, i.e., introducing the problem of inter-American judicial review with a concrete example, the final parts will address the IACtHR invalidation of the Brazilian amnesty law, which was established in two different cases throughout inter-American jurisprudence. This final section will address the resistance on the part of Brazilian judicial authorities, more specifically the Brazilian constitutional court judges, to adopting inter-American jurisprudence on amnesty laws as a decisive reference point when reviewing the validity of the Brazilian amnesty statute within the domestic system of judicial review. These Brazilian cases involving the contested validity of an amnesty statute represent the best example of how inter-American judicial review can lead to conflicts between national and inter-American authorities within the new context for human rights enforcement described as Latin American cosmopolitan constitutionalism in this study.

Yet, before undertaking this analysis of cosmopolitan constitutional interaction between domestic and inter-American authorities, it is necessary to address what enables this cosmopolitan relationship. The most important trigger for the emergence of bottom-up cosmopolitan constitutionalism in Brazil was the adoption of the 1988 constitution.[130] It was this constitution that has led the country to a gradual integration through human rights law into the Latin American human rights enforcement context. Brazilian legal cosmopolitanism has relied mostly on the evolution of human rights protection, democracy and the rule of law promoted by the recent normative framework of the 1988 constitution.

2.2. The 1988 cosmopolitan constitution

After the authoritarian rule of a military dictatorship (1964-1985), the 1988 constitution was described as the *citizen constitution* by one of the leading political figures of the 1987-1988 constituent assembly, Deputy Ulysses Guimarães.[131] After decades of indirect elections, which

[130]It is important to remember that *integration through human rights law* is an on-going process, which has involved different actors. Beyond legal authorities, previous Brazilian administrations and legislatures were responsible for yielding authority to the inter-American level of human rights protection. Civil society has also strengthened the Brazilian integration into the IAS through the work of NGOs and human rights defenders.
[131]Ulysses Guimarães, Discourse on the Occasion of the Promulgation of the Constitution, available in Portuguese at: http://ref.scielo.org/yf7dtp.

resulted in non-democratic and authoritarian administrations, Brazil was finally able to find its way back to constitutional democracy. The first years of the new democracy were very turbulent with the death of Brazil's first president arriving before he had even taken office and the impeachment of the third president for corruption scandals. Since the start, the new Brazilian constitutional order has had a difficult way.

The length of the 1988 constitutional text is what first gets the reader's attention.[132] The Brazilian constitution has currently 250 articles, which extensively address several different topics from fundamental rights and the organization of state to very specific provisions on social security, education, culture, and sports. Despite a special procedure requiring a higher majority for constitutional amendments, the constitutional text was amended almost 100 times in its first 30 years of existence.[133] The preamble of the constitution establishes that the representatives of the Brazilian people convened the constitutional assembly in order "to institute a democratic state destined to ensure the exercise of social and individual rights, liberty, security, well-being, development, equality and justice" as the highest values of a society "founded on social harmony and committed, in the domestic and international orders, to the peaceful solution of disputes."[134] Moreover, Art. 3 establishes the fundamental objectives of the new constitutional order, i.e., i) to build a free, just and unified society, ii) to guarantee national development; iii) to eradicate poverty and substandard living conditions, and to reduce social and regional inequalities; and, finally, iv) to promote the well-being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination.[135]

The 1988 constitution aligned Brazil with constitutional practices more recently associated with the label of global constitutionalism. As another example of a democratic constitution in Latin America that was adopted after a period of authoritarian rule, the Brazilian constitution imposes on state authorities some strong commitments to representative democracy, the rule of law, and human rights enforcement. These strong commitments are present throughout the whole constitutional text, but they are more emphatically stated in Art. 60 (4), which establishes the unamendable character of the federalist form of government; direct, secret, universal and periodic elections; the separation of powers; and individual rights

[132]The best introduction to the Brazilian constitutional order for English speakers is arguably: Virgílio Afonso da Silva, The Constitution of Brazil. A Contextual Analysis, (Oxford et al.: Hart Publishing, 2019).
[133]"The part of the Constitution that has been the most affected by constitutional amendments is that in which state intervention in the economy is regulated." Ibid, 2. The 1988 constitution has been amended 99 times.
[134]Brazilian constitution, preamble.
[135]Ibid, art. 3.

and guarantees.[136] This constitutional provision represents what legal scholars have described as the eternal constitutional clauses.[137] They represent a core of constitutional identity, which shapes the basis of the constitutional order established in 1988.

With regard to its commitments to democracy, the 1988 constitution represents a return of representative democracy after decades of indirect elections. In order to emphasize that Brazilians were finally citizens again with the right to have their voice heard in representative bodies, the constitution adopted the mandatory vote.[138] The new constitution also established different forms of direct popular participation such as the plebiscite, the referendum and the possibility for the people to propose laws.[139] The rule of law has been guaranteed through the separation of powers and the system of checks and balances, which encompasses the executive, the legislature and the judiciary. An important innovation in order to guarantee the rule of law in the country is the considerable increase in the authority of the *Ministério Público*, the Brazilian Public Ministry.[140] The constitutional court, the Brazilian *Supremo Tribunal Federal* (STF), existed before the 1988 constitution, but it has also experienced a growth of its authority, especially after the adoption of new laws with regard to judicial review of legislation.[141]

First, it is worth underscoring the important role that has been attributed to the Brazilian STF in most recent decades. As Conrado Hübner Mendes has pointed out, the court "has been portrayed as one of the responsible actors, if not the foremost, for the main achievements in

[136]Brazilian constitution, art. 60 (4).
[137]Within German legal scholarship, legal scholars have referred to unamendable constitutional provisions as *Ewigskeitsklauseln* (eternal clauses). On the importance of these eternal clauses for constitutional law and how they have affected the practice of judicial review in different constitutional orders, see: Yaniv Roznai, Unconstitutional Constitutional Amendments, (Oxford: Oxford University Press, 2017).
[138]According to Art. 14 (1) of the Brazilian constitution, voting is compulsory for persons over 18 years old and optional for the illiterate, persons over 70 years old and those over 16 and under 18 years old. Mandatory vote has been a usual feature of Latin American constitutions. Carlos Santiago Nino even considered mandatory vote an essential feature of constitutional democracies, because he found it an effective solution to the problem of political apathy: "I have defended the preservation in Argentina of the present system of compulsory voting (…). It helps solve the collective-action problem, which otherwise may frustrate the interests of many participants and distort the tendency of the democratic process to create impartial solutions. Abstentionism may in fact cause deterioration of the democratic process, since it is harmful not only to the very people who decline to vote but to all citizens." Carlos Santiago Nino, The Constitution of Deliberative Democracy, (New Haven, London: Yale University Press, 1996), 155.
[139]"Popular sovereignty shall be exercised by universal suffrage, and by direct and secret vote, with equal value for all, and, as provided by law, by: i) plebiscite, referendum, iii) popular initiative." Brazilian constitution, art. 14.
[140]"The Public Ministry is a permanent institution, essential to the jurisdictional function of the State, with responsibility for defending the legal order, the democratic regime and indispensable social and individual interests." Ibid, art. 127.
[141]Ibid, arts. 101-103.

fundamental rights by Brazilian democracy since the beginning of the 2000s."[142] However, several institutional features have overly empowered the Brazilian constitutional court.

As Oscar Vilhena Vieira has noted, the Brazilian STF is an example of a *super constitutional court*.[143] This label is due to its substantial powers within the Brazilian justice system. The Brazilian STF is simultaneously: i) a constitutional court, ii) a specialized judicial court and iii) a court of last appeal. As a constitutional court, its authority relies mostly on the judicial review of laws and normative acts with binding effect for the federal and state levels; as a specialized court, its influence lies in its power to judge cases involving major state officials; as a court of last appeal, the STF has authority over millions of petitions within the Brazilian justice system. In order to cope with this heavy case load, the STF may issue, for instance, *súmulas vinculantes* (binding precedents) and it may establish the general effects of decisions in some special procedures, which contribute to its influence over legal practice more generally.[144] The Brazilian STF has gained social prominence due to the high level of constitutional litigation in Brazil and also for having its sessions broadcast in its Justice Channel. Controversial rulings often hit the headlines of newspapers and are discussed in several TV shows. All these factors contribute to the phenomenon that has been described as the Brazilian *supremocracy*.[145] This institutional context affects the interaction between the highest Brazilian court and the IACtHR, as it will become clear later in this chapter.

Beyond the eternal clause on individual rights and guarantees, the 1988 constitution has gradually strengthened its commitments to human rights. Art. 5 of the original constitutional text lists an extensive catalogue of the fundamental rights of Brazilians and foreigners that reside in the country.[146] Art. 5 (1) establishes the direct effects of fundamental rights and guarantees within Brazilian law.[147] Moreover, Art. 5 (2) establishes that the rights and guarantees in the constitution do not exclude others derived from ratified international

[142]Conrado Hübner Mendes, "The Supreme Federal Tribunal of Brazil," in *Comparative Constitutional Reasoning*, eds. András Jakab, Arthur Dyevre, Giulio Itzcovich, (Cambridge: Cambridge University Pres, 2017), 115-153, 117.
[143]See: Oscar Vilhena Vieira, "Descriptive Overview of the Brazilian Constitution and Supreme Court," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, eds. Oscar Vilhena, Upendra Baxi, Francis Viljoen, (Johannesburg: Pretoria University Law Press, 2013), 75-105.
[144]Ibid, 102. See also the provision in: Brazilian constitution, art. 103-A.
[145]Oscar Vilhena Vieira, "Supremocracia," Revista Direito Getúlio Vargas 9, (2009), 441-464. It is worth mentioning that, more recently, the National Council of Justice was established as an organ to oversee the Brazilian judiciary: Brazilian constitution, art. 103-B. According to Art. 103-B (4), this council has the responsibility to control the administrative and financial functioning of the judiciary and the domestic judges' performance.
[146]Brazilian constitution, art. 5.
[147]Ibid, art. 5 (1).

treaties.[148] Flavia Piovesan has noted that "[t]he post-1988 period presents the broadest normative production of human rights law in all Brazilian legislative history,"[149] and that "[t]he 1988 Constitution celebrates the reinvention of the Brazilian normative legal framework in the field of human rights protection."[150] The ratification of the ACHR and the acceptance of the IACtHR contentious jurisdiction gave the Brazilian constitutional order a more cosmopolitan character. From the ratification of the ACHR until its full integration into the IAS, Brazil went through a gradual process of yielding authority to the inter-American level of human rights protection. Brazil ratified the ACHR on September 7, 1992, but it was not until 1998 that the country accepted the authority of the IACtHR, which completed its full integration into the IAS. Since then, the IACtHR has been able to rule on violations of the ACHR by Brazilian authorities and it has had the opportunity to rule over 9 Brazilian cases to date. Some of these cases will be analyzed in the following part of this chapter in order to illustrate the cosmopolitan relationship between the national and inter-American authorities.

Given that the original text of the constitution had no clear provision about the hierarchy of international human rights treaties within Brazilian law, legal authorities and scholars have tried to address this issue and provide its most adequate interpretation. Some scholars argued that international human rights treaties already enjoyed constitutional rank based on Art. 5 (2) of the Brazilian constitution.[151] Others disagreed and affirmed that, since there was no clear reference to this constitutional authority of international human rights law, these treaties enjoyed only a simple legal rank within Brazilian law.[152] Constitutional Amendment No. 45 of 2004 (CA 45) added Art. 5 (3) to the constitution, according to which international human rights treaties and conventions might acquire constitutional rank after been submitted to the same procedure established for constitutional amendments.[153] The only convention approved by this

[148]Ibid, art. 5 (2).
[149]Flávia Piovesan, "Fuerza Integradora y Catalizadora del Sistema Interamericano de Protección de los Derechos Humanos: Desafios para la Formación de un Constitucionalismo Regional," in *La Justicia Constitucional y su Internacionalización. ¿Hacia un Ius Constitucionale Commune en América Latina?, Vol. II*, eds. Armin von Bogdandy et al., (Ciudad del Mexico: Universidad Nacional Atónoma de México, 2010), 431-448, 443.
[150]Ibid.
[151]Flávia Piovesan and Valério de Oliveira Mazzuoli have long advocated for this interpretation within Brazilian legal scholarship. See: Flávia Piovesan, Direitos Humanos e o Direito Constitucional Internacional 14th ed., (São Paulo: Saraiva, 2013); Valerio de Oliveira Mazzuoli, Controle Jurisdicional da Convencionalidade das Leis, 5th ed., (Rio de Janeiro: Forense, 2018).
[152]See, for instance: Laerte José de Castro Sampaio, "Interpretação Constitucional Sobre Alienação Fiduciária e Prisão Civil," in *Os 10 Anos da Constituição Federal*, ed. Alexandre de Moraes, (São Paulo, Atlas, 1999), 83-91; Maurício Adreiuolo Rodrigues, "Os Tratados Internacionais de Proteção dos Direitos Humanos e a Constituição," in *Teoria dos Direitos Fundamentais*, (Rio de Janeiro: Renovar, 1999), 153-191.
[153]"International treaties and conventions on human rights approved by both houses of the National Congress, in two different voting sessions, by the three-fifths votes of their respective members, shall be equivalent to Constitutional Amendments." Brazilian constitution, art. 5 (3).

procedure to date has been the Inter-American Convention on the Rights of Persons with Disabilities.[154] The ACHR has not been submitted to this procedure, which means that the convention still does not enjoy constitutional rank within the Brazilian legal system.

It is worth mentioning that CA 45 also added Art. 109 (5) to the Brazilian constitution, which establishes that, in cases of gross human rights violations, the Procurator-General of the Republic may request that the Superior Court of Justice refer a specific case to federal authorities.[155] The purpose of this provision is to strengthen the investigation and provide faster remedies for serious human rights violations through the agency of federal authorities. The provision is based on the principle that the federal level is the one that is the most responsible for enforcing international human rights treaties within Brazilian law. Finally, it is also worth mentioning that CA 45 added Art. 5 (4) to the constitution, which establishes that Brazil accepts the authority of the International Criminal Court.[156]

However, CA 45 has not settled the debate about the authority of international human rights law within Brazilian law. There was still controversy about the authority of international human rights treaties that did not pass through the special procedure established by the new Art. 5 (3) of the Brazilian constitution. As Gilmar Mendes has pointed out: "legal scholars and authorities have already advocated for the legal, supra-legal, constitutional or even supra-constitutional authority of human rights treaties."[157] Finally, in the landmark decision within *RE 466.343*, the Brazilian constitutional court unanimously established that international human rights treaties that were not approved in accordance with the special procedure of Art. 5 (3) of the Brazilian constitution enjoy a special type of authority within domestic law, which differs from the authority enjoyed by ordinary international treaties.[158] For the Brazilian constitutional court, international human rights treaties enjoy a *supra-legal* but *infra-constitutional* authority within Brazilian law. This refers especially to the authority of the ACHR within Brazilian law. Given this fact, it is worth analyzing *RE 466.343* with greater attention.

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[154]The Inter-American Convention on the Elimination of All forms of Discrimination Against Persons with Disabilities was adopted in 1999 and entered into force on September 14, 2001.
[155]Brazilian constitution, art. 109 (5).
[156]Ibid, art. 5 (4).
[157]Gilmar Ferreira Mendes, "A Justiça Constitucional nos Contextos Supranacionais," in *Transnacionalidade do Direito*, ed. Marcelo Neves, (São Paulo: Quartier Latin, 2011), 243-286, 258.
[158]Brazilian STF, (Judgement) December 3, 2008, Case of *RE 466.343/SP*. For Flavia Piovesan, in this judgement the Brazilian STF changed its jurisprudence that since 1977 ranked international treaties at the same level of ordinary laws. See: Piovesan, Fuerza Integradora y Catalizadora del Sistema Interamericano de Protección de los Derechos Humanos, 444.

This case involved the controversy about the civil imprisonment for indebtedness in the case of an unfaithful trustee. This form of civil imprisonment is prohibited according to Art. 7 (7) ACHR, which allows civil imprisonment only in the case of non-fulfilment of duties of support.[159] In contrast, the Brazilian constitution allows it according to its Art. 5 (LXVII).[160] The Brazilian STF held different interpretations of this norm conflict between the ACHR and the Brazilian constitution throughout case law. Some initial decisions established that the constitutional provision should prevail, given that the ACHR enjoyed simple legal rank as an international treaty within Brazilian law.[161] Finally, in *RE 466.343/SP*, the Brazilian STF ruled for the *supra-legal* but *infra-constitutional* authority of international human rights treaties and, most importantly here, of the ACHR within Brazilian law based on the fact that the convention is an international treaty that was not approved according to the procedure established by Art. 5 (3) of the Brazilin constitution.[162] Flávia Piovesan has claimed that according to current Brazilian constitutional court's jurisprudence, there are 5 votes in favor of this supra-legal but infra-constitutional authority of international human rights treaties and 4 votes in favor of the constitutional authority of these treaties within Brazilian law.[163]

It is beyond the scope of this study to fully address the domestic enforcement of the ACHR by the Brazilian constitutional court and how the Brazilian judges have interpreted the authority of inter-American human rights law within domestic law.[164] It is worth remembering that the authority of inter-American human rights law does not only depend on legal enforcement but also on the overall influence over domestic lawmaking and administrative practices.[165] Although this study will not engage in an analysis of the general enforcement of inter-American human rights law by the Brazilian political and legal authorities, it will illustrate

[159]"No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support." ACHR, art. 7 (7).
[160]"There shall be no civil imprisonment for debt, except for a person who voluntarily and inexcusably defaults on a support obligation and for an unfaithful depository." Brazilian constitution, art. 5 (LXVII).
[161]Several of these decisions are mentioned by Gilmar Mendes. See: Mendes, A Justiça Constitucional nos Contextos Supranacionais, 260-275.
[162]According to Judge Cezar Peluso: "the special character of these international human rights diplomas reserves them a specific place in the legal system, being below the Constitution, but above the domestic legislation." Brazilian STF, (Vote Judge Cezar Peluso) December 3, 2008, Case of *RE 466.343/SP*.
[163]Piovesan, Fuerza Integradora y Catalizadora del Sistema Interamericano de Protección de los Derechos Humanos, 444.
[164]On this issue, see, for instance: Tom Gerald Daly, "Brazilian 'Supremocracy' and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship," in *Law and Policy in Latin America. Transforming Courts, Institutions and Rights*, eds. Pedro Fortes, Larissa Boratti, Andrés Lleras, Tom Gerald Daly, (London: Palgrave Macmillan, 2017), 3-20.
[165]See: *The Inter-American Human Rights System. Impact Beyond Compliance*, ed. Par Engstrom (London: Palgrave Macmillan, 2019).

the cosmopolitan relationship between national authorities and the IACtHR in the following analysis of some Brazilian cases at the inter-American level. This is useful for the following discussion of the normative questions related to the practice of inter-American judicial review of domestic laws within Latin American cosmopolitan constitutionalism.

2.3. Brazil before the IACtHR: cosmopolitan relationship between domestic and inter-American authorities

For legal scholars seeking to address the normative questions related to inter-American judicial review, Brazilian cosmopolitan law might be the best case to study. This is due to the inconsistent attitude that national authorities have adopted with regard to the enforcement of inter-American human rights jurisprudence. In some cases, they have enforced the IACtHR decisions on domestic human rights violations, while in others they have simply ignored inter-American jurisprudence. This inconsistent attitude explains the methodology of this part of the study. Vicki Jackson has distinguished three possible attitudes of domestic authorities towards international law: resistance, convergence and engagement.[166] Based on his approach and on the inconsistent attitude of national authorities towards inter-American human rights law, the following section distinguishes two major case groups: i) cases that illustrate convergence and engagement with inter-American human rights jurisprudence and ii) cases that illustrate the resistance on the part of national authorities to adopt inter-American jurisprudence as a meaningful reference point for domestic practices of state authority. Some general points on these two different case groups are worth mentioning.

Cosmopolitan convergence and engagement represent the intimate relationship between domestic constitutional practices and inter-American human rights enforcement. The cases analyzed within this case group illustrate how Latin American cosmopolitanism works in legal practice. The following analysis aims at demonstrating how inter-American human rights jurisprudence might address traditional issues of oppression and non-emancipatory practices that have followed Brazilian constitutionalism for a long time. Inter-American human rights jurisprudence offers a different context of adjudication for these traditional challenges, pointing at new horizons for Brazilian constitutionalism. Hence, inter-American human rights

[166]Vicki J. Jackson, Constitutional Engagement in a Transnational Era, (Oxford et al.: Oxford University Press, 2010), 8.

adjudication may lead to transformative human rights practices within domestic constitutionalism. In fact, the interaction between Brazilian and inter-American authorities has consequences for both levels of rights enforcement. Brazilian cases have contributed to more creative and consistent regional human rights jurisprudence. The analysis of the following cases intends to demonstrate, first, how Brazilian constitutional practices have been affected by regional jurisprudence and, second, how Brazilian case law has contributed to the Inter-American framework for human rights enforcement. In a nutshell, cosmopolitan convergence demonstrates how constitutionalism is not a project carried out solely by the agency of national authorities anymore. Domestic authorities may gain from a comparative regional framework for human rights enforcement, as long as they also contribute to its development.

The resistant attitude is addressed in order to illustrate the normative questions related to inter-American judicial review of domestic laws. These normative questions are revealed primarily through the national authorities' resistance to adopt inter-American human rights jurisprudence as a meaningful reference point for judicially reviewing domestic laws. The resistance to inter-American jurisprudence can be more clearly illustrated by two Brazilian cases before the IACtHR. These cases were related to the validity of the Brazilian amnesty law, which was declared incompatible with the ACHR by the IACtHR. Moreover, these cases are particularly relevant for the general authority of inter-American human rights jurisprudence. The resistance offered by Brazilians authorities in these cases represents, ultimately, a resistance to the authority of the IACtHR to practice inter-American judicial review. Similar to cosmopolitan convergence, resistance has consequences for both the domestic and the inter-American levels as it will become clear in the final part of this chapter.

2.3.1. Converging with inter-American human rights jurisprudence

Why should national authorities align domestic constitutional practices with inter-American human rights jurisprudence? The obvious answer to this question is: Because they are obliged to do it based on the ACHR. However, the analysis of the cosmopolitan relationship between national and inter-American human rights authorities reveals other answers to this compliance question. According to cosmopolitan constitutionalism, national authorities should comply with inter-American human rights jurisprudence because i) domestic violations serve as bottom-up inputs for the regional framework for human rights enforcement and ii)

throughout its evolution, this regional framework has become the best reference point for human rights enforcement in Latin America. Based on these two factors, cosmopolitan convergence and engagement represent, at least *prima facie*, a better option than resistance to inter-American human rights jurisprudence

There is a number of Brazilian cases that illustrate the advantages of cosmopolitan convergence between national and inter-American human rights law. The following analysis of cosmopolitan convergence is limited to three Brazilian cases before the IACtHR. These three cases can demonstrate the transformative potential of the inter-institutional interaction between national and inter-American human rights authorities. This section will point out how this inter-institutional interaction has led or can lead to the transformation of national and inter-American human rights law in each case.

In *Ximenes Lopes v. Brazil*,[167] the IACtHR addressed the cruel and degrading conditions under which Mr. Damião Ximenes Lopes was hospitalized in a psychiatric institution that operated within the Brazilian public health care system. Mr. Ximenes Lopes suffered serious physical and psychological attacks from the institution's staff and died three days after his hospitalization. The IACtHR established violations of the rights to life and to humane treatment (Arts. 4 (1), 5 (1) and 5 (2) ACHR) based on the state's duty to provide protection to individuals within the public health care system. It also established a violation of Arts. 8 (1) and 25 (1) ACHR due to the negligence of state authorities for not investigating the circumstances of Mr. Ximenes Lopes' death.

The IACtHR underscored the relevance of *Ximenes Lopes* as the first opportunity to rule on the violation of the human rights of a person with mental illness based on Arts. 4 and 5 ACHR.[168] This has represented an enrichment of the inter-American framework for human rights enforcement. In the decision, the IACtHR took the opportunity to address the rights of mentally ill people and the state's duties regarding them.[169] The IACtHR first acknowledged the inevitably vulnerable position of people with mental illness due to their particular psychological and emotional conditions: "increased vulnerability is due to the imbalance of power between patient and the medical staff," and due "to the high degree of intimacy, which

[167]IACtHR, (Judgment) July 4, 2006, Case of *Ximenes Lopes v. Brazil*.
[168]Ibid, §123.
[169]Ibid, §124-149.

is typical of the treatment of psychiatric illnesses."[170] Based on this vulnerable position, the IACtHR established that the staff should aim to ensure the patient's welfare and respect his or her dignity.[171] For the IACtHR, the duties of respect necessarily lead to a principled use of restraint techniques within psychiatric institutions, i.e., "any action which interferes with the ability of a patient to take decisions or which restricts his or her freedom of movement."[172] Restraint should be used as a last resort and limited to the purpose of protecting the patient, medical staff or third parties when patient's behavior pose a threat to their safety.

Based on this IACtHR decision, local state authorities ordered the reopening of the investigations of Mr. Ximenes Lopez's death, which eventually led to domestic criminal procedures against the director of the psychiatric institution where he was hospitalized. The case also led the state's authorities to improve psychiatric institutions in the country and to promise to adopt better staff training in the treatment of mental illnesses.[173] Even though the treatment in psychiatric institutions in Brazil still remains a serious issue that demands more effective public policies, the domestic adoption of the IACtHR decision should not be taken for granted. The decision has not only become a meaningful reference point for reopening the investigation of Mr. Ximenes's case. It has also turned into an important reference for domestic institutions and activists seeking to combat violations of mentally ill people's human rights in Brazil. After this IACtHR judgement, these domestic players have another strong argument to make when seeking to advocate against the cruel treatment that has become common practice in many psychiatric institutions in the country.

In *Favela Nova Brasilia v. Brazil*,[174] the IACtHR addressed the arbitrary use of police force in a favela located in the city of Rio de Janeiro. The IACtHR established the violations of the ACHR on the grounds that the police had not investigated the murder of 26 community residents and the sexual abuse of other three residents during two police operations in 1994 and 1995. The case reveals the transformative potential of inter-American jurisprudence with regard to the arbitrary use of police force in the Brazilian favelas.

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[170]Ibid, §129.
[171]Ibid, §130. For the IACtHR, the respect for intimacy and autonomy should be regarded as a guiding principle of the treatment of people with mental illnesses.
[172]Ibid, §§133-136.
[173]See: Cassia Maria Rosato, Ludmila Cerqueira Correia, "Caso Damião Ximenes Lopes. Cambios y Desafios Después de la Primera Condena de Brasil por Parte de la Corte Interamericana de Derechos Humanos," SUR 8, no. 15, (2011), 93-115. See also: Isaac de Paz González, The Social Rights Jurisprudence in the Inter-American Court of Human Rights, Shadow and Light in International Human Rights, (Cheltenham: Edward Elgar Publishing, 2018), 123-145.
[174]IACtHR, (Judgement) February 16, 2017, Case of *Favela Nova Brasília v. Brazil*.

The IACHR addressed the practice of registering the deaths during the police operations under *resistance to authority* reports (*autos de resistência* in Portuguese). By filling these reports, civil police usually justified the extreme use of force as self-defense, despite that the autopsies of the victims attested to the fact that they were fatally shot.[175] These reports were issued before even initiating investigations and hindered due diligence in the cases. The investigations basically consisted of assembling a victims' profile with his or her criminal records and often came to an end with the presumption that the victims had potentially been criminal. Moreover, they often began with the presumption that policy officers were acting in compliance with the law and that the killings were the necessary results of resistance to police authority during the raids. For some domestic and international authorities, these reports served to legitimate extrajudicial and summary executions.[176]

The IACtHR concluded that the reports served to transfer the responsibility for the executions from the police force to the victims.[177] Based on that, the IACtHR ordered that "the concept of 'opposition' or 'resistance' to police action must be abolished."[178] Beyond a mere change of the reports' name, the court ordered that domestic authorities should ensure consistency in the reports on personal injury and murder due to the police action. The IACtHR decision in *Favela Nova Brasilia* led to the reopening of investigations of the specific police operations involved in the case. According to the domestic authorities directly involved, the reopening of the investigations is a clear step to ensure the effectiveness of inter-American human rights jurisprudence within national law.[179] This IACtHR decision may now serve as additional support for domestic NGOs and several other human rights defenders and institutions that oppose the arbitrary use of police force in underprivileged urban areas around the country. The *resistance to authority* reports best illustrate this arbitrary use of force and many domestic players have opposed them as a mean to explain the deaths caused by police operations in Brazil. After the international decision in *Favela Nova Brasilia*, national authorities are now internationally obliged to stop this illegitimate use of police force.

[175]Ibid, §105.
[176]The Special Rapporteur of the United Nations on Extrajudicial, Summary and Arbitrary Executions claimed that these reports "have frequently badly disguised extrajudicial executions" by the police force in Brazil. Ibid, §108.
[177]Ibid, §193.
[178]Ibid, §335.
[179]See: "MP Reabre Investigações de Chacinas Ocorridas nos anos 90 em Favela do Rio," O Estado de S. Paulo, July 10, 2018, https://brasil.estadao.com.br/noticias/rio-de-janeiro,mp-reabre-investigacoes-de-chacinas-ocorridas-nos-anos-90-em-favela-do-rio,70002396637.

In *Hacienda Brasil Verde v. Brazil*,[180] the IACtHR ruled on the alleged conditions of enslavement in a farm located in the state of Para, in the north of Brazil. The IACtHR established a violation of Art. 6 ACHR ("Freedom from Slavery") based on the lack of due diligence on the part of state authorities. For the IACtHR, the local state authorities were supposed to prevent or to put an end to the contemporary form of slavery found in the case once they were aware of the cruel and degrading working and living conditions in the Brazil Verde farm, which included: i) the lack of proper payment, housing, food and hygiene, ii) work under threats and armed surveillance, and iii) arbitrary salary deductions for essential expenses like food or medicine, which frequently led to debts that could not possibly be paid by the workers.

Hacienda Brasil Verde has also enriched the regional framework for human rights enforcement based on the bottom-up case inputs. For Isaac de Paz González, the case became a landmark one because it was the first decision on contemporary forms of slavery, forced labor and exploitation perpetrated by private individuals within inter-American jurisprudence, and because it addressed historically structural discrimination based on poverty.[181] In terms of how these concepts were applied in *Hacienda Brasil Verde*, the IACtHR established a strict concept of the contemporary form of slavery in light of international documents and comparative human rights jurisprudence. For the IACtHR, this contemporary form of slavery can be determined based on, among other factors:[182] i) the restriction or control of individual autonomy ii) to the benefit of the perpetrator; iii) the absence of consent or free will on the part of the victim due to threats or other forms of coercion, fraud or false promises, and iv) the use of physical or psychological violence. The IACtHR included the working and living conditions of the Brazil Verde farm as falling under the concept of contemporary slavery and considered them a clear violation of the ACHR and several other national and international documents.

In addition to establishing violations based on slavery, the IACtHR established a violation of Art. 6 (1) ACHR based on the "historical structural discrimination" of the farm workers due to their economic position. This is due to the fact that other organizations had previously denounced the practice of slavery in the farm. Later, some workers were even able to escape from the farm and tried to report on their working conditions, but the local police authorities refused to hear the case due to the carnival holiday.[183] Based on these facts, the

[180]IACtHR, (Judgment) October 20, 2016, Case of *Hacienda Brasil Verde Workers v. Brazil*.
[181]Issac de Paz González, The Social Rights Jurisprudence in the Inter-American Court of Human Rights, 172.
[182]IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, §272.
[183]Ibid, §327.

IACHR found that local authorities had discriminated against the workers due to their unprivileged social condition. For the commission, local authorities aligned themselves with the farmers, since they saw each other as belonging to the same social class. The evidence of this discrimination was the lack of criminal cases against the local farmers and also the conciliatory approach adopted by local judicial authorities within cases relating only to farm workers' labor rights.[184]

The IACtHR regarded poverty as one of the possible reasons for structural discrimination, which is prohibited according to Art. 24 ACHR ("Right to Equal Protection"). The court addressed "the indissoluble link" between Arts. 24 and Art 1 (1) ACHR and established that poverty could be understood as a factor in discrimination.[185] The IACtHR concluded the existence of structural discrimination against the farm workers as a "part of the population that shared characteristics related to its conditions of exclusion, poverty and lack of education."[186] Based on that, it ruled that the state was responsible for violations of Arts. 6 (1) and 1 (1) ACHR due to the "historical systemic discrimination based on the economic position" of the farm workers.[187] Judges Eduardo Ferrer Mac-Gregor and Elizabeth Odio Benito underscored the concept of historical structural discrimination based on poverty as an innovative feature of inter-American human rights jurisprudence in their concurrent opinion on the case.[188]

Hacienda Brasil Verde relates to the battle against contemporary forms of slavery in Brazil. As the IACtHR also acknowledged, Brazil kept the institution of slavery for more than three centuries. This long practice of slavery still has consequences for contemporary Brazilian society, since many workers, especially those with black skin, are still discriminated against by means of lower wages and poor working conditions. Prominent Brazilian authorities have addressed the challenges of bringing slavery to a definitive end and also acknowledged the remaining forms of slavery in the country.[189] The IACtHR decision in *Hacienda Brasil Verde*

[184]Ibid, §414.
[185]Ibid, §335.
[186]Ibid, §417.
[187]Ibid, 4th operative paragraph.
[188]For them: "The IACHR recognized in the Judgment, for the first time, that the discriminatory facts of the present case were derived from the economic position -because of their situation of poverty- of the 85 victims who were inside the Hacienda Brasil Verde." IACtHR, (Separate Opinion Judge Eduardo Ferrer Mac-Gregor and Judge Elizabeth Odio Benito), *Hacienda Brasil Verde Workers v. Brazil*, §46.
[189]The former president of Brazil, Fernando Henrique Cardoso, admitted that the enforcement of the abolition of slavery law (*Lei Áurea*) from 1888 is still a challenge in some parts of the country; IACtHR, *Hacienda Brasil Verde*, §116, note 83.

goes in the same direction as the emancipatory work of several domestic institutions and activists. This decision strengthens the efforts to fight against contemporary forms of slavery within domestic law. Moreover, the concept of historical structural discrimination based on poverty may now serve as a useful reference point for Brazilian authorities and civil society. This innovative element of inter-American human rights jurisprudence may now be adopted by domestic litigants in cases involving discrimination based on their economic position within Brazilian law.

2.3.2. Resisting inter-American human rights jurisprudence

Resistance to inter-American human rights law does not simply involve non-compliance with inter-American human rights jurisprudence. Non-compliance is something ordinary within regional rights systems for human rights protection and it also frequently happens within the IAS. One of the most decisive factors for this is the vast array of ordered measures that is usually established by the IACtHR. Due to the many different ordered reparatory measures, full compliance with the IACtHR decisions might even be considered an exception within the IAS. Resistance to inter-American jurisprudence involves non-compliance with the IACtHR decisions, but it also involves national authorities undermining the authority of inter-American human rights law. Domestic authorities can be described as adopting a resistant attitude as long as they establish substantial obstacles to the enforcement of inter-American human rights law within national law. This has happened in at least two cases involving the inter-American judicial review of the Brazilian amnesty law: *Gomes Lund v. Brazil*[190] and *Herzog v. Brazil*.[191] In both cases, the IACtHR invalidated the Brazilian amnesty law, given that this domestic statute has represented an obstacle for the prosecution and punishment of serious human rights violations committed by the military regime (1964-1985).

Gomes Lund, also known as *Guerrilha do Araguaia*, involved the arbitrary detention, torture, enforced disappearance and extrajudicial executions of political opponents of the Brazilian military government. In order to intimidate the opposition, the Brazilian army sent more than 3000 soldiers between 1972 and 1975 to the region of the Brazilian river *Araguaia*, where the *guerrilheiros* were thought to be forming an armed opposition to the regime. Initially,

[190]IACtHR, (Judgement) November 24, 2010, Case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*.
[191]IACtHR, (Judgement) March 15, 2018, Case of *Herzog et al. v. Brazil*.

the incursions of the army were only meant to observe the development of the *guerrilha* but, eventually, the soldiers were ordered to exterminate the members of the armed oppositional group. After more than 40 years, about 60 group members are still missing. Due to the unwillingness of Brazilian authorities to investigate the facts based on the enforcement of the Brazilian amnesty law, a petition was filled to the IACHR, which eventually led to the case before the IACtHR.

More recently, another case was reported to the IACtHR due to the domestic enforcement of the amnesty statute. In *Herzog*, the IACtHR was asked to rule on the murder by state officials of the journalist Vladimir Herzog, which occurred in one of the military facilities used for interrogation of suspected leaders of the opposition. Herzog was asked to answer some questions and, in the following day, voluntarily presented himself to the military facility. After hours of interrogation and torture, Herzog was found dead, hanging with a belt around his neck in the interrogation room. The official version given by the military state was that Herzog had committed suicide.[192] His murder caused a national commotion, followed by several days of strikes led by journalists' unions, students and university professors. Thousands were present at his funeral and at a mass celebrated in his memory. The journalist's arbitrary execution was an important historical point for the civil opposition to the military dictatorship. Due to the national resonance of the case, the military government conducted an official investigation to clarify the circumstances of Herzog's death. Nevertheless, the official declaration, which was based on fake forensics, claimed that Herzog had committed suicide.[193]

As mentioned, a solution to the human rights violations in *Gomes Lund* and *Herzog* was not possible within domestic law. The criminal investigation of the cases was dismissed several times, even after the Brazilian democratization led by the 1988 constitution. The main reason for all dismissals was the enforcement of the amnesty law (Law No. 6683/1979), which has not allowed the prosecution of human rights violations committed during 1961 and 1979.[194] In the

[192]In order to set a suicide scene, military officials also faked a suicidal letter.
[193]This official version got so discredited that Herzog was not even buried among people who committed suicide in the Jewish cemetery. See: IACtHR, *Herzog v. Brazil*, §151.
[194]The Law No. 6683/1979 established:

"1. Amnesty is granted to all whom, in the period between September 2, 1961, and August 15, 1979, committed political crimes or derived crimes to these, electoral crimes, to those who had their political rights suspended, and to direct or indirect public servants of the administration, of foundations that belong to the public power, to the public servants of the legislative and judicial powers, to the military, leaders, and union representatives, who were punished based on institutional and complementary acts.

merits section of *Gomes Lund*, the IACtHR established the incompatibility between the amnesty law and the ACHR. For the IACtHR, "amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Human Rights Law."[195] The IACtHR found that "the provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention" and, therefore, these provisions "lack legal effect."[196] In *Herzog*, the IACtHR also established the invalidity of the Brazilian amnesty law based on the non-existence of an armed conflict at that time in the country, which could in principle bring legitimacy to the use of an amnesty law if the aim were to bring this internal conflict to an end.[197]

The IACtHR also emphasized that the enforcement of the Brazilian amnesty law went against inter-American human jurisprudence on the matter and it represented, therefore, a clear underenforcement of the ACHR by Brazilian authorities. In the judgement of both Brazilian cases, the IACtHR followed its precedent decision in *Barrios Altos v. Peru*, which represented the first opportunity to rule on the incompatibility between domestic amnesty laws and the ACHR. It is worth mentioning that, since *Barrios Altos*, the IACtHR has established an anti-impunity approach to amnesty laws in several cases involving countries like Chile, Uruguay and El Salvador. Moreover, inter-American amnesty case law has also been responsible for the emergence of conventionality control.[198]

In *Gomes Lund*, the IACtHR established the duty of conventionality control regarding the review of the amnesty statute within domestic law. For the IACtHR, national judicial authorities are internationally obliged to exercise the ex officio review of the amnesty statue:

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§ 1. For the purposes of this Article, derived crimes are those crimes of any nature related to political crimes or carried out with political motivation.

§ 2.- Those excluded from the benefit of this amnesty are persons who were convicted of the crimes of terrorism, assault, kidnapping, and personal attacks."

This English translation can be found in: IACtHR, *Gomes Lund v. Brazil*, §134.

[195]IACtHR, *Gomes Lund v. Brazil*, §171.

[196]IACtHR, *Gomes Lund v. Brazil*, 3rd operative paragraph.

[197]IACtHR, *Herzog v. Brazil*, §209.

[198]The following chapter will explain in greater detail how conventionality control functions as a specific form of strong inter-American judicial review of domestic laws.

"The Judicial Power (…) is internationally obligated to exercise the 'control of conventionality' ex officio between the domestic norms and the American Convention."[199] Moreover, the domestic judicial authorities should "take into account not only the treaty, but also the interpretation that the Inter-American Court, as the final interpreter of the American Convention, has given it."[200] In *Herzog*, the IACtHR claimed that the domestic judicial authorities' duty to review the amnesty law existed since 1992, when the country ratified the ACHR and, in view of that, they "should have performed an ex officio control of conventionality between domestic rules and the American Convention."[201]

Although the IACtHR established in both cases conventionality control as an obligation for domestic judicial authorities, the practice of conventionality control is particularly problematic in the case of the Brazilian amnesty law due to the judgement by the Brazilian STF in the *Arguição de Descumprimento de Preceito Fundamental* (Claim of Non-compliance with a Fundamental Precept - *ADPF*) *No. 153.*[202] This claim of non-compliance with a fundamental precept (ADPF) is an action of the Brazilian system of abstract judicial review of legislation and it was used by domestic institutions in order to contest the constitutionality of the Brazilian amnesty law within the current constitutional order established by the 1988 constitution. Within *ADPF No. 153*, the Brazilian STF established, in a seven to two vote, the conformity of the 1979 amnesty law to the 1988 Brazilian constitution. This decision of the national highest court has *erga omnes* effects for which only few remedies can apply. Hence, it represents a major obstacle imposed by the Brazilian constitutional court to the effectiveness of inter-American jurisprudence on amnesty statues within Brazilian law. This domestic decision has figured as the most prominent act of resistance on the part of these Brazilian judicial authorities to adopt inter-American human rights jurisprudence as a meaningful reference point for constitutional rights adjudication.[203]

[199]IACtHR, *Gomes Lund v. Brazil*, §176.
[200]Ibid.
[201]IACtHR, *Herzog v. Brazil*, § 292.
[202]Brazilian STF, (Judgement) April 29, 2010, *Claim of Non-Compliance with a Fundamental Precept (ADPF) No. 153.*
[203]Virgilio Afonso da Silva has recently commented on the contemporary validity of the Brazilian amnesty law: "The fact that this highly controversial type of amnesty – self-amnesty – has been almost unanimously accepted as valid even after the end of the authoritarian regime is one of the most intriguing peculiarities of the transition to democracy in Brazil. (…) [O]nly 30 years after its enactment the Amnesty Law was challenged before the STF, which, however, in a very controversial decision, upheld its constitutionality." Virgilio Afonso da Silva, The Constitution of Brazil. A Contextual Analysis, (Oxford et al: Hart Publishing, 2019), 21-22.

The arguments presented by the STF judges who voted for the constitutionality of the 1979 amnesty law may be summarized in three main points: i) the amnesty law represented, in its historical context, a national pact that has enabled Brazil's transition from a military dictatorship to a constitutional democracy; ii) by means of Constitutional Amendment No. 26/1985 (CA 26),[204] there was a reaffirmation of the validity of the 1979 amnesty law in the contemporary constitutional order established by the 1988 constitution; and that iii) the Brazilian legislature would be the competent authority to review the 1979 amnesty law and not the Brazilian constitutional court.

The core argument for the current validity of the 1979 amnesty law was that the historical context inevitably led to it. In fact, this interpretation of the Brazilian transition to democracy was present in all votes of the Brazilian STF judges in favor of the amnesty statute's validity. For the Justice Rapporteur of *ADPF No. 153*, the amnesty law represented a "political decision in a moment of conciliatory transition in 1979," given that "all were absolved, and some absolved themselves."[205] This political agreement carried out by the Brazilian legislative could not be changed by the constitutional court, since the congress would be the only appropriate authority to do so. Finishing his vote, the Justice Rapporteur ruled that: "The Amnesty Law of 1979 does not belong to the past constitutional order. It was reaffirmed in the new constitutional order and constituted a new fundamental norm, and as such its conformity to the Constitution of 1988 is unquestionable."[206] The Justice Rapporteur's vote demonstrates a "general mindset of the transition to democracy" that was widely shared by other members of the Brazilian STF in the decision of *ADPF No. 153*.[207]

Chief Justice Cesar Peluso claimed: "Each people come to terms with the past according to their culture, feelings, character and history; Brazil has opted for a conciliatory path."[208] Justice Carmen Lúcia claimed that "Amnesty was a necessary and indispensable step in the path of Brazilian democracy."[209] Justice Ellen Gracie added: "Amnesty is the overcoming of

[204]This constitutional amendment established the following constituent assembly (1987-1988), which was responsible for the adoption of the 1988 constitution.
[205]Brazilian STF, (Vote of the Justice Rapporteur), *ADPF No. 153*.
[206]Ibid.
[207]Juliano Zaiden Benvindo, "Memory and Forgetfulness in the Brazilian Dictatorship: Can New Revelations Help Brazil Expiate its Sins?," Int'l J. Const. L. Blog, July 5, 2018, available at: http://www.iconnectblog.com/2018/07/memory-and-forgetfulness-in-the-brazilian-dictatorship-can-new-revelations-help-brazil-expiate-its-sins/.
[208]Brazilian STF, (Vote of the Chief Justice Cezar Peluso), *ADPF No. 153*.
[209]Brazilian STF, (Vote of Justice Carmen Lucia), *ADPF No. 153*.

the past, which looks forward to reconciliation in society."[210] It is beyond the scope of this study to extensively discuss questions of transitional justice with regard to the debate about the Brazilian amnesty law.[211] There is no need for a historical review of the Brazilian amnesty law to demonstrate that the Brazilian cases of *Gomes Lund* and *Herzog* illustrate best the resistance that national authorities may adopt to enforcing inter-American human rights jurisprudence within domestic law. Most importantly, these cases illustrate the resistance that a constitutional court may adopt with regard to the effectiveness of inter-American judicial review of domestic laws.

2.4. Conclusion: A constitutional court's resistance to strong inter-American judicial review

The 1988 Brazilian constitution was the initial trigger for the emergence of bottom-up cosmopolitan constitutionalism within Brazilian law. After the 1964-1985 authoritarian regime in the country, the 1988 constitution imposed some strong commitments on national authorities involving democracy, human rights enforcement, and the rule of law. The 1988 constitution is aligned with other constitutions around the globe that also established these same strong commitments to the three pillars of global constitutionalism within domestic law. Regarding human rights enforcement, the constitution strengthened the authority of international human rights law within Brazilian law. Within this *cosmopolitanization* of Brazilian constitutional law with respect to human rights protection, it was worth emphasizing that the country ratified the ACHR in 1992 and accepted the contentious jurisdiction of the IACtHR in 1998. A subsequent amendment to the constitution (CA 45/2004) established a procedure to grant constitutional rank to international human rights treaties. The current Brazilian constitutional order is an illustrative example of a Latin American cosmopolitan constitutional order, i.e., a constitutional order that is fully integrated into the new Latin American human rights enforcement context.

[210]Brazilian STF, (Vote of Justice Ellen Gracie), *ADPF No. 153*.

[211]This would necessarily involve the comparative analysis of the relationship between amnesty laws and the concept of transitional justice. On this issue, see: *Amnesty in the Age of Human Rights Accountability. Comparative and International Perspectives*, eds. Francesca Lessa, Leigh A. Payne, (New York et al: Cambridge University Press, 2012); Louise Mallinder, Amnesty, Human Rights and Political Transitions. Bridging the Peace and Justice Divide, (Oxford, Portland: Hart Publishing, 2008). Focusing on the Latin American context, see: *Transitional Justice. Handbook for Latin America*, ed. Félix Ratégui, (Brasilia: Brazilian Amnesty Commission, Ministry of Justice, 2011).

In the past decades, national authorities have been under the scrutiny of the inter-American institutions, i.e., the IACHR and the IACtHR. The interaction between national and inter-American authorities has been transformative of domestic practices of state authority. This chapter has described this transformative role of inter-American jurisprudence with reference to cases involving traditional domestic human rights violations like the abuse of people with mental illness in public psychiatric institutions, the arbitrary use of police force in underprivileged urban areas and the contemporary forms of enslavement in rural areas. Focusing on Brazilian case law before the IACtHR, there are evident advantages of cosmopolitan convergence with inter-American jurisprudence. Brazilian authorities have much to gain if they consistently refer to the inter-American framework for human rights enforcement when trying to find solutions for the traditional human rights violations within domestic law. This is due to the fact that, over time, the IACtHR has created valuable jurisprudence by addressing the traditional violations of human rights in different Latin American countries. This chapter has also emphasized that Brazilian case law enriched this inter-American framework, offering the IACtHR the opportunity to issue landmark decisions on fundamental issues relating to the enforcement of the ACHR. Brazilian case law has enriched inter-American human rights jurisprudence, which may be later adopted by other Latin American authorities and civil society when dealing with similar cases of domestic human rights violations.

However, the evolution of cosmopolitan constitutionalism in Brazil has not only gone in one direction. It has also included the resistance on the part of the Brazilian constitutional court to the inter-American judicial review of the Brazilian amnesty law. It is worth mentioning that the judgment in *ADPF No. 153* was issued even before the IACtHR issued its decision in *Gomes Lund*. The Brazilian constitutional court did not even wait for the IACtHR interpretation of the matter before establishing the constitutionality of the amnesty statute within domestic law. The IACtHR, in turn, did not accept the arguments of transitional justice offered by the judges of the Brazilian constitutional court. For the IACtHR, "the decision of the Federal Supreme Court confirmed the validity of the interpretation of the Amnesty Law without considering the international obligations" of the country, "particularly those established in Articles 8 and 25 of the American Convention, in relation with Articles 1(1) and 2 of the same."[212]

[212]IACtHR, *Gomes Lund v. Brazil*, §§176-177.

Within the IAS, there have been two conflicting decisions issued by prominent courts with regard to the validity of the Brazilian amnesty law. This leads to the question of which decision should prevail. In fact, this conflict between the IACtHR and the Brazilian constitutional court gives rise to other important questions relating to inter-American judicial review. For instance: How are national authorities supposed to enforce conventionality control at the domestic level? Does inter-American judicial review even bind domestic judicial authorities within the IAS in the way the IACtHR has claimed it does? Are domestic authorities allowed to adopt a critical approach to the practice of strong inter-American judicial review? Does this critical approach necessarily represent resistance to inter-American human rights jurisprudence? These questions reveal that there are substantial obstacles to the consistent practice of inter-American judicial review, at least when seen from a bottom-up perspective. Despite the adoption of cosmopolitan constitutions, there is still not a consistent normative guide for domestic judicial authorities seeking to implement inter-American judicial review within the IAS. The resistance on the part of Brazilian authorities attests to the necessity for a consistent practice of inter-American judicial review that does not leave any scope for national authorities to oppose it. However, before addressing this ideal normative model of inter-American judicial review, it is necessary to study in greater detail the specific forms of strong inter-American judicial review that have been adopted to date. In line with this, this study will address these specific forms in the following chapter.

PART II. THE COURT IN ACTION

III. Inter-American Human Rights Jurisprudence: From Transitional to Transformative Justice

The IACtHR has adopted two specific forms of international judicial review of domestic laws throughout inter-American human rights jurisprudence: conventionality control and the direct enforcement of socioeconomic rights. This chapter will first describe the emergence of these two forms and, in the following chapter, the normative grounds for their practice will be discussed. It is important to point out that these two forms of inter-American judicial review can describe the evolution of human rights enforcement in Latin America as a whole. Conventionality control emerged from the necessity to enforce civil and political rights in cases of systematic human rights violations practiced by authoritarian regimes in the past. These gross violations marked the first important phase of inter-American jurisprudence, which was mostly concerned with questions of transitional justice. The direct enforcement of socioeconomic rights represents a more recent phase of inter-American jurisprudence, which is focused on questions of material inequality and institutional failure in the region. Due to the more recent character of this inter-American judicial practice, its specific features are still emerging. This chapter argues that, based on the evolution of inter-American case law on socioeconomic rights, there is sufficient evidence that the IACtHR will start reviewing domestic legislation on these rights as part of practicing their direct enforcement.

3.1. Conventionality control: enforcing civil and political rights in Latin America

3.1.1. The genesis of conventionality control

It is important to understand the circumstances under which conventionality control emerged. This specific form of strong inter-American judicial review of domestic laws is directly related to questions of transitional justice. The transitional justice phase of inter-American jurisprudence was characterized by, among other things, the judicial review of domestic amnesty laws that were adopted by some Latin American governments as a condition for domestic democratization. Hence, amnesty case law illustrates the initial phase of inter-American human jurisprudence, which was focused on the prosecution of systematic human

rights violations committed by dictatorships. Amnesty case law reveals that conventionality control was, at least at the start, a jurisdictional reaction to the systematic underenforcement of civil and political rights at the domestic level. In this context, amnesty laws were the trigger for the emergence of conventionality control. It is true that the practice of conventionality control was also refined in cases that were not related to amnesty laws, but amnesty case law was the genesis of conventionality control as a specific form of strong inter-American judicial review.[213]

The IACtHR Judge Sergio García Ramirez initially mentioned the idea behind conventionality control in several separate opinions. First, Judge García Ramirez just referred to conventionality control in the context of the general international responsibility of states under the IACtHR jurisdiction.[214] Later, he added one first remarkable feature to the concept by distinguishing it from domestic constitutional review.[215] He emphasized the differences between conventionality control and domestic constitutional review in subsequent judgements.[216] Despite these previous mentions of conventionality control by Judge García Ramirez, it was within amnesty case law that the doctrine had its first explicit mention, more specifically in the decision of *Almonacid Arellano v. Chile*.[217] This judgement is the most important document on conventionality control and its most discussed paragraph reads:

> "The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their

[213]Chapter VII will analyze inter-American jurisprudence on amnesty statutes as an argument for the judicial review of the Brazilian amnesty law. In the present section, the mentions to cases involving amnesty statutes will be made based on their relevance for the emergence and evolution of the specific features of conventionality control.
[214]IACtHR (Separate Opinion Judge Sérgio Garcia Ramirez) November 25, 2003, Case of *Myrna Mack Chang v. Guatemala*, §27. Although it does not translate "conventionality control" in English, the expression that Judge Garcia Ramirez used in Spanish was *control de convencionalidad*.
[215]IACtHR (Separate Opinion Judge Sérgio Garcia Ramirez) July 7, 2004, Case of *Tibi v. Ecuador*.
[216]IACtHR (Separate Opinion Judge Sérgio Garcia Ramirez), February 1, 2006, Case of *López Alvarez* v. Honduras, §30; IACtHR (Separate Opinion Judge Sérgio Garcia Ramirez) September 26, 2006, Case of *Vargas Areco v. Paraguay*, §6.
[217]IACtHR, (Judgement) September 26, 2006, Case of *Almonacid Arellano et al. v. Chile*.

> inception. In other words, *the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights.* To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention."[218] (emphasis added)

According to this first explicit mention of conventionality control by the IACtHR, domestic judges are responsible for resolving conflicts between domestic laws and the ACHR. In fact, based on *Almonacid*, the domestic judges, as national control holders, should review domestic legislation that, according to the IACtHR, violates inter-American human rights law. The IACtHR explicitly mentioned that domestic judicial authorities should take inter-American human rights legislation and jurisprudence as a meaningful reference point when engaging in domestic rights enforcement. Based on this first description of conventionality control, the IACtHR implies that national authorities should privilege international human rights law over domestic law in case of conflicts between these different realms of regulation. For Laurence Burgorgue-Larsen, *Almonacid* has represented a transition to the stage of consolidation of the practice of conventionality control within inter-American human rights jurisprudence.[219] From then on, its specific features have been refined by several IACtHR decisions, concurrent opinions of IACtHR judges and also by the frequent intersections with the scholarly debate about strong inter-American judicial review of domestic laws.

3.1.2. The specific features of conventionality control

The practice of conventionality control has strengthened the regional authority of the IACtHR. It is necessary to understand how conventionality control has acquired its contemporary form throughout inter-American jurisprudence and how it has been responsible for debates about the increasing authority of the IACtHR within the IAS. This section will describe the evolution of conventionality control's specific features. This involves the analysis

[218]Ibid, §124.
[219]Laurence Burgorgue-Larsen, "Chronicle of a Fashionable Theory in Latin America. Decoding the Doctrinal Discourse on Conventionality Control," in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano-Herrera, (Cambridge et al.: Intersentia, 2015), 647-676, 652.

of some IACtHR decisions and also of concurrent opinions issued by some IACtHR judges.[220] This section will focus on the most important cases and individual concurring opinions that have contributed to conventionality control's contemporary form.

Almonacid was responsible for establishing what conventionality control is in principle, but it did not say much on how national authorities were supposed to practice it. After *Almonacid*, the IACtHR quickly noticed potential problems with the domestic enforcement of its innovative but broad concept. One of the initial challenges was the fact that the different constitutional orders within the IAS have different judicial review systems, which usually differ between diffuse and concentrate systems.[221] It was then just months after *Almonacid* that the IACtHR first added new features to conventionality control in *Dismissed Congressional Employees v. Peru.*[222] These new features related more to procedural questions, i.e., that conventionality control should be exercised *ex officio* and within the competences of the immediate judicial authority of a case in accordance with domestic law.[223]

After the IACtHR refined these procedural aspects of conventionality control, it started strengthening its legal basis with references to the ACHR. In *Heliodoro Portugal v. Panama*,[224] the IACtHR first explicitly based conventionality control on the principle of effectiveness (*effet utile*) as stated in Art. 2 ACHR ("Domestic Legal Effects"). As this study has already mentioned, Art. 2 ACHR establishes that the IAS member states "undertake to adopt, in accordance with their constitutional processes and the provisions" of the ACHR, "such

[220]On the importance of individual concurring opinions within inter-American human rights jurisprudence, see: Ranieri L. Resende, "Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?," Northwestern Journal of Human Rights 17, no. 1, (2019), 26-50.

[221]There are also mixed forms of judicial review systems, such as the Brazilian system. On this issue, see: Virgílio Afonso da Silva, "Beyond Europe and the United States: The Wide World of Judicial Review," in *Comparative Judicial Review*, eds. Erin F- Delaney, Rosalind Dixon, (Cheltenham et al.: Edward Elgar Publishing, 2018), 318-336. It is worth mentioning Mark Tushnet's opinion that these structural features of judicial review have lost relevance over time: "The differences between specialized and generalist constitutional courts, and abstract and concrete review, are no longer matters of central scholarly concern. As judicial review spread, experience showed that structural features, including the appointment process, are less important than was initially thought." Mark Tushnet, "Judicial Review of Legislation," in *Oxford Handbook of Legal Studies*, eds. Mark Tushnet, Peter Cane, (Oxford et al.: Oxford University Press, 2005), 165-182, 167.

[222]IACtHR, (Judgement) November 24, 2006, Case of *Dismissed Congressional Employees v. Peru*.

[223]"When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet utile* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of "conventionality" ex officio between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action." Ibid, §128.

[224]IACtHR, (Judgement) August 12, 2008, Case of *Heliodoro Portugal v. Panama*.

legislative or other measures as may be necessary to give effect" to the rights protected by the convention.[225] For the IACtHR, Art. 2 ACHR requires two different types of measures: "the repeal of laws and practices of any kind that entail a violation of the guarantees established in the Convention" and "the enactment of laws and the development of practices conductive of respect for those guarantees."[226] There are therefore positive and negative duties associated with the principle of effectiveness as applicable to the relationship between inter-American human rights law and domestic law. Based on that, the IACtHR ruled that national judicial authorities should guarantee the effectiveness of inter-American human rights law so that it is not overruled by the enforcement of contrary domestic law. For the court, "the defense of or respect for human rights, arising from international commitments concerning the work of the Judiciary, must be achieved through the so-called 'conventionality control'."[227]

It is worth mentioning that not only Art. 2 ACHR has been offered as a normative basis for the practice of conventionality control. Some IACtHR judges have also based the practice of conventionality control on Article 1 (1) ACHR, which refers to the general obligation to respect human rights. Judge Eduardo Ferrer Mac-Gregor also based conventionality control on Art. 25 ACHR, which refers to the right of judicial protection.[228] Art. 29 ACHR ("Restrictions Regarding Interpretation"), which is usually referred as the *pro homine*, or *pro persona* principle, has also been mentioned in the discussion of the legitimacy of conventionality control. For some authorities and scholars, domestic law can often represent an illegitimate restriction of the rights protected by the ACHR. Domestic judicial authorities are therefore responsible for reviewing domestic laws in cases of conflict with inter-American human rights law.

Beyond these ACHR provisions, Arts. 26 and 27 of the Vienna Convention on the Law of Treaties have also been mentioned as offering a legal basis to the practice of conventionality control.[229] Art. 26 of the Vienna Convention refers to the well-known *pacta sunt servanda* clause, according to which "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[230] Directly related to the practice of conventionality control,

[225]ACHR, art. 2.
[226]IACtHR, *Heliodoro Portugal v. Panama*, §180.
[227]Ibid.
[228]See: Eduardo Ferrer Mac-Gregor, "Conventionality Control. The New Doctrine of the Inter-American Court of Human Rights," American Journal of International Law Unbound 109, (2015), 93-99.
[229]The Vienna Convention on the Law of Treaties (VCLT) was signed on May 23,1969 and entered into force on 27 January 1980.
[230]VCLT, art. 26.

Art. 27 of the Vienna Convention establishes that a member of any treaty system "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[231] Despite the fact that legal authorities and scholars have invoked provisions from several international documents in order to justify the practice of conventionality control, Art. 2 ACHR still represents the core of the normative grounds for its practice. It is by invoking Art. 2 ACHR that the IACtHR have made conventionality control a specific form of strong inter-American judicial review of domestic laws.

Regarding the national authorities that are empowered to practice conventionality control, Laurence Burgorgue-Larsen has rightly noted that the IACtHR expanded the catalogue of conventionality control's owners in a series of decisions.[232] The IACtHR initially referred only to judicial authorities as being competent to practice conventionality control.[233] Then, in *Cabrera Garcia and Montiel Flores v. Mexico,*[234] the IACtHR established that conventionality control could be practiced by "judges and *organs related to the administration of justice*" (my emphasis).[235] After that, prosecutors were explicitly mentioned among potential authorities for the practice of conventionality control[236] until, eventually, in *Gelman v. Uruguay*, the IACtHR extended conventionality control to "any public authority" within the IAS.[237]

Despite the fact that the court has adopted a broad catalogue of conventionality control's owners, domestic judicial authorities still remain the most prominent agents of conventionality control for this study. This is due to the fact that judicial authorities are the ones that are competent to practice judicial review of legislation and, by doing so, guarantee the effectiveness of inter-American judicial review within national law. When the IACtHR orders that national authorities should amend domestic laws, this order is specially oriented to domestic judges, who can practice the judicial review of legislation that was considered inconsistent by the IACtHR. Indeed, although national legislatures are the most important public authorities to amending domestic legislation, in *Almonacid v. Chile*, the IACtHR explicitly mentioned domestic judicial authorities as the ones responsible for the practice of conventionality control.

[231]Ibid, art. 27.
[232]Burgorgue-Larsen, Chronicle of a Fashionable Theory in Latin America, 654.
[233]As, for instance, in *Almonacid*, See: IACtHR, *Almonacid Arellano v. Chile*, §124.
[234]IACtHR, (Judgement) November 26, 2010, Case of *Cabrera García and Montiel Flores v. Mexico*.
[235]Ibid, §225.
[236]IACtHR, (Judgement) November 20, 2012, Case of *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, § 330.
[237]IACtHR, (Judgement) February 24, 2011, Case of *Gelman v. Uruguay*, §239.

Also relevant within the specific features of conventionality control is the difference between diffuse and concentrate control, which was addressed by Judge Eduardo Ferrer Mac-Gregor in his concurrent opinion on *Cabrera Garcia and Montiel Flores*.[238] For him, the distinction is grounded in regimes of domestic judicial review. He claimed that concentrate conventionality control has been exercised by the IACtHR since the beginning of its contentious jurisdiction within the IAS. By contrast, the IACtHR has introduced the novelty of diffuse conventionality control, according to which the domestic judge is converted "into an Inter-American judge, into the first and true guardian of the American Convention, of its Additional Protocols (and possibly of other international instruments) and of the jurisprudence of the Inter-American Court."[239] He admitted that this practice of diffuse control may vary according to domestic laws on judicial review. In view of this, he claimed that "the intensity of 'diffuse conventionality control' will diminish in those systems that do not permit "diffuse constitutionality control' and, therefore, not all judges have the authority to not apply a law to a specific case."[240]

Regarding the pieces of national law that could trigger the practice of conventionality control, the IACtHR has emphasized that any domestic document can be subjected to review. Based on that, the control involves the *ex officio* review of judicial and administrative acts, legislation and even domestic constitutional provisions if they present any incompatibility with the block of conventionality. In *Gelman v. Uruguay*, the IACtHR ruled that even democratic processes may be subjected to review according to conventionality control.[241] In order to practice conventionality control, inter-American and domestic authorities should take, according to Judge Eduardo Ferrer Mac-Gregor, the "block of conventionality" into account.[242] For him, inter-American human rights law represents a parameter for the practice of conventionality control of domestic legislation and comprises the ACHR and other international documents within the Inter-American corpus iuris.[243] The IACtHR has on several occasions referred to the *block of conventionality control*. In *Gudiel Álvarez et al. v.*

[238]IACtHR, (Concurring Opinion Judge Ad Hoc Eduardo Ferrer Mac-Gregor) November 26, 2010, Case of *Cabrera García and Montiel Flores v. Mexico*.
[239]Ibid, §24.
[240]Ibid, §37.
[241]IACtHR, (Judgement) *Gelman v. Uruguay*, §239.
[242]IACtHR, (Concurring Opinion Judge Ad Hoc Eduardo Ferrer Mac-Gregor) November 26, 2010, Case of *Cabrera García and Montiel Flores v. Mexico*, §44.
[243]As Chapter I has already mentioned, the current Inter-American corpus iuris encompasses the ACHR, supplemented by its two protocols, other inter-American human rights documents and international treaties and, most importantly, inter-American human rights jurisprudence.

Guatemala,[244] for instance, the IACtHR ruled that national authorities should, when practicing conventionality control, take into account not only the ACHR but also other inter-American documents that were ratified by the state and inter-American human rights jurisprudence.[245]

Judge Ferrer Mac-Gregor also admitted that, based on the (non-)ratification of international and, more specifically, inter-American documents, there can be several types of conventionality control within the IAS. If an IAS member state did not ratify a specific document, the domestic and inter-American authorities cannot include it into the specific block of conventionality involved in the case. However, Judge Ferrer Mac-Gregor noted that, with the evolution of the IAS, the block of conventionality at the regional level often coincides with the block of constitutionality at the domestic level, given that several international instruments have constitutional authority within many Latin American legal systems.[246]

It is worth mentioning what Burgorgue-Larsen has described as the *raison d'etre* of conventionality control,[247] i.e., the teleological grounding for its practice. For Judge Ferrer Mac-Gregor, the main objectives of conventionality control are to prevent the enforcement of incompatible national laws, create an integrated system of human rights protection and facilitate judicial dialogue within the IAS.[248] Most importantly, he has claimed that conventionality control is an essential mechanism to lead human rights enforcement within the IAS towards an "authentic *Ius Constitutionale Commune Americanum*."[249] However, there are also less altruistic objectives associated with the practice of conventionality control. Conventionality control has arguably emerged due to the IACtHR fear of non-effective and non-authoritative jurisprudence. The logic behind stating direct effects and primacy to the IACtHR decisions is that conventionality control could bolster the effectiveness of inter-American human rights jurisprudence. In fact, the implementation of conventionality control led to an exponential increase in the authority of the IACtHR in its relationship with domestic authorities (more specifically with domestic judicial authorities). Hence, improving the effectiveness of inter-

[244] IACtHR, (Judgement) November 20, 2012, Case of *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*.
[245]Ibid, §330.
[246]IACtHR (Concurring Opinion Judge Ad Hoc Eduardo Ferrer Mac-Gregor), Case of *Cabrera García and Montiel Flores v. Mexico*, §26.
[247]Burgorgue-Larsen, Chronicle of a Fashionable Theory in Latin America, 656-658. She referred to the concurring opinions of Judge Sergio García Ramírez as decisive for understanding the objectives of conventionality control. However, Judge Eduardo Ferrer Mac-Gregor has played a protagonist role as an advocate for the practice of conventionality control. In line with this, this study will refer to his interpretation of conventionality control's objectives.
[248]Eduardo Ferrer Mac-Gregor, "Conventionality Control. The New Doctrine of the Inter-American Court of Human Rights," American Journal of International Law Unbound 109, (2015), 93-99, 98-99.
[249]Ibid, 99.

American human rights jurisprudence is arguably the main objective behind the inter-American practice of conventionality control.

Finally, it is also worth mentioning that, since its initial forms, conventionality control has revealed an intense intersection between inter-American jurisprudence and scholarly debate. This intersection tells much about the evolution of conventionality control to the contemporary phase of a specific form of strong inter-American judicial review of domestic laws. To give an example of this intersection, besides his past position within the IACtHR, Judge Sergio García Ramírez is also a prominent Mexican constitutional scholar, who has written much on the theoretical grounds of conventionality control. This dual position is also shared by current IACtHR judges, especially by Judge Eduardo Ferrer Mac-Gregor, another prominent Mexican constitutional lawyer that currently presides over the IACtHR and has discussed conventionality control in several academic articles. This mixture of legal authority and scholar led Laurence Burgorgue-Larsen describe these prominent figures as "actor-researchers," given that they are simultaneously thinkers and agents of the practice of conventionality control within the IAS.[250]

3.2. The direct enforcement of socioeconomic rights

Inter-American jurisprudence on socioeconomic rights has evolved from an indirect protection of these rights to the establishment of an autonomous and direct form of international judicial enforcement. This evolution has happened based on innovative legal interpretations of the relationship between different inter-American human rights documents, but especially between the ACHR and the Protocol of San Salvador, which is the most specific inter-American document on socioeconomic rights. The judicially enforceable character of socioeconomic rights represents a new phase of inter-American human rights jurisprudence, i.e., the transformative justice phase. Transformative justice has material inequality and institutional failure as its main concerns.[251] The following sections will first describe the initial phase of an indirect protection of socioeconomic rights through civil and political rights. Then, this chapter

[250]Laurence Burgorgue-Larsen, Chronicle of a Fashionable Theory in Latin America, 666.
[251]On this isse, see: Armin von Bogdandy, "The Transformative Mandate of the Inter-American System. Legality and Legitimacy of an Extraordinary Jurisgenerative Process," Max Planck Institute Research Paper Series, no. 16, (2019), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463059. See also the contributions in: *Transformative Constitutionalism in Latin America*, eds. Armin von Bogdandy et al., (Oxford: Oxford University Press, 2017).

will describe the emergence of the direct judicial enforcement of socioeconomic rights within inter-American human rights jurisprudence and explain why it represents an emerging specific form of strong inter-American judicial review of domestic laws.

3.2.1. The indirect protection of socioeconomic rights through civil and political rights

There are political and legal reasons for the few inter-American cases addressing socioeconomic rights.[252] The most important political reason was the rule of authoritarian regimes, which directed the IACtHR's focus towards the protection of civil and political rights in Latin America. This later changed in the history of the IAS, when domestic democratic regimes enabled the court to address other rights not immediately related to the human rights violations committed by authoritarian regimes.[253] With regard to the legal reasons, the ACHR represented a first obstacle to the evolution of an autonomous inter-American case law on socioeconomic rights. As previously mentioned in this study, the ACHR contains just one article on these rights, i.e., Art. 26 ACHR ("Progressive Development"). In addition to this provision, the ACHR mentions socioeconomic rights in its preamble, where it establishes that "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."[254]

As Chapter I has explained, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, or "Protocol of San Salvador," is an inter-American treaty that more specifically addresses socioeconomic rights.[255] The rights catalogue of the Protocol of San Salvador (PSS) enumerates the right to work and to the just, equitable and satisfactory conditions of work; trade unions rights, social security rights; right to health and a healthy environment; right to food, education, benefits of culture, formation

[252]This category of rights also encompasses environmental rights. I have opted to address these rights simply as "socioeconomic rights." The most essential character of these rights is that they are not primarily related to civil rights and political liberties, which represent a more traditional category of human rights. While legal scholars usually address civil rights as "first-generation rights," socioeconomic rights are often addressed as "second-generation rights" and environmental rights, in turn, as "third-generation rights." I have not adopted this typology based on the different eras of their emergence in this study.

[253]Claudio Grossman has distinguished 3 important phases of inter-American human rights jurisprudence: dictatorship, transition to democracy and the last phase of struggle against inequality and poverty. Claudio Grossman, "The Inter-American System and Its Evolution," Inter-American & European Human Rights Journal 2, no. 1-2, (2009), 49-65.

[254]ACHR, preamble.

[255]The Protocol of San Salvador (PSS) was adopted on November 17, 1988 and entered into force in 1999.

and protection of families; the rights of children, and the protection of the elderly and disabled. This protocol also establishes the progressive enforcement obligation with regard to socioeconomic rights in its Art. 1.[256] Moreover, it establishes the obligation to enact domestic legislation in order to guarantee the effectiveness of inter-American legislation on socioeconomic rights,[257] and it regulates the scope of the domestic restrictions and limitations of socioeconomic rights.[258] Finally, it is worth mentioning that the PSS establishes that states must periodically submit reports to the OAS Secretary General, which are later forwarded to the Inter-American Council for Integral Development and to the IACHR. According to its Art. 19 (6), the IACHR and the IACtHR have authority to rule on petitions that allege violations of trade union rights (Art. 8 (a) PSS) and the right to education (Art. 13 PSS).[259]

Despite the adoption of the PSS within inter-American human rights legislation, socioeconomic rights are still not directly mentioned by the ACHR and this indirect relation has had consequences for legal practice. Throughout most of inter-American human rights jurisprudence, there was no autonomous or direct enforcement of socioeconomic rights, which were always enforced within cases involving the civil and political rights expressly mentioned in the convention. Protecting socioeconomic rights through civil and political rights was the indirect way that the IACtHR found to respond to their violations at the domestic level. Thomas Antkowiak has mentioned examples of this indirect protection.[260] One example comes from the interpretation of Art. 4 ACHR ("Right to Life"). Case law involving Art. 4 ACHR led the IACtHR to establish the concept of a dignified life (*vida digna* in Spanish), which involves remedies relating to socioeconomic rights as well. In the case of incarcerated persons, for instance, the IACtHR established that they may enjoy the *right to a dignified life* to be ensured by opportunities of physical exercises, recreation and education; as well as medical, dental and psychological care.[261] Another example mentioned by Antkowiak in his studies of inter-American jurisprudence is case law involving the right to property (Art. 21 ACHR). Within regional case law involving the rights of indigenous people to their traditional lands, the right

[256]PSS, art. 1.
[257]Ibid, art. 2.
[258]Ibid, art. 5.
[259]"Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights." Ibid, art. 19 (6).
[260]See: Thomas Antkowiak, "Social, Economic, and Cultural Rights. The Inter-American Court at a Crossroads," in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano-Herrera (Cambridge: Intersentia, 2015), 259-276.
[261]Ibid, 270-272.

to property has also indirectly involved a wide range of socioeconomic rights granted to indigenous communities.[262]

These different case groups illustrate how the indirect relation between the ACHR and socioeconomic rights has necessarily linked them to civil and political rights at the regional level. For Antkowiak, this necessary link may have undermined the significance of socioeconomic rights within inter-American human rights law.[263] This initial necessary relation hindered the evolution of specific regional case law on socioeconomic rights. This is also related to the fact that neither the IACHR nor representatives of the victims argued violations of Art. 26 ACHR for a considerable time. With the evolution of inter-American case law on socioeconomic rights, the IACtHR has gradually adopted the direct enforcement of these rights, as the following section will explain.

3.2.2. The emergence of the direct enforcement of socioeconomic rights

Similar to conventionality control, the IACtHR decisions and the individual concurrent opinions of some IACtHR judges have played a significant role throughout the evolution of inter-American jurisprudence on socioeconomic rights. The IACtHR judges have on several occasions disagreed about some important points referring to the direct judicial enforcement of socioeconomic rights and this can be illustrated especially by their individual concurrent opinions. This section will focus on the most important cases for the emergence and evolution of the direct judicial enforcement of socioeconomic rights. The following cases illustrate the initial dismissal of petitions based on Art. 26 ACHR to the currently established autonomous and direct enforcement of this ACHR provision by the IACtHR.

The first landmark case towards the direct enforcement of socioeconomic rights was *Five Pensioners v. Peru*.[264] This case concerned the review of pensions cuts within Peruvian law and it was the first case in which the IACHR directly alleged a violation of Art. 26 ACHR before the IACtHR. In its decision, the IACtHR recognized "both an individual and a collective dimension" of socioeconomic rights and claimed a right of all members of the population to

[262]Ibid, 272-273.
[263]Antkowiak has claimed that "[i]f economic, social and cultural rights are only important because they enable or support civil and political rights, this implies that they are subordinate and inferior to civil and political rights;" Ibid, 275.
[264]IACtHR, (Judgement) February 28, 2003, Case of *"Five Pensioners" v. Peru*.

social security and to a pension.[265] Nevertheless, the IACtHR did not establish a violation of Art. 26 ACHR, arguing that the limited group of petitioners could not represent the conditions experienced by the entire population in Peru.[266] This interpretation was criticized by authorities and scholars in some specific points.[267] In his concurrent opinion on this decision, Judge Sergio Garcia Ramirez emphasized that the decision could be reviewed in the future. For him, it was necessary to review the hierarchy of socioeconomic rights within inter-American jurisprudence.[268]

Years later, *Acevedo Buendía v. Peru*[269] represented another landmark case towards the direct judicial enforcement of socioeconomic rights by the IACtHR. In this case, the IACtHR established that the progressive development obligation (Art. 26 ACHR) with regard to socioeconomic rights is judicially enforceable. The IACtHR considered itself "fully competent to analyze the violations of all rights enshrined in the American Convention."[270] Based on that, the IACtHR established that the duty under Art. 26 ACHR is subject to the general obligations of Arts. 1 (1) and 2 ACHR, similar to the enforcement of civil and political rights within inter-American jurisprudence.[271] The IACtHR also referred to the duty over regressive measures relating to socioeconomic rights as stated by the UN Committee on Economic, Social and Cultural Rights. The IACtHR acknowledged that "there is a duty- *though conditioned* - of not adopting retrogressive steps"[272] (emphasis added). Based on that, regressive measures

[265]Ibid, §147.
[266]"Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development (…) should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation." Ibid.
[267]The IACtHR decision in *Five Pensioners* was criticized by some legal scholars who have traditionally advocated for the judicially enforceable character of socioeconomic rights at the inter-American level. See: Tara J. Melish, "The Inter-American Court of Human Rights. Beyond Progressivity," in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008), 372-408. See also: Christian Courtis, "Luces y Sombras. La Exigibilidad de los Derechos Económicos, Sociales y Culturales en la Sentencia de los Cinco Pensionistas de la Corte Interamericana de Derechos Humanos," in *El Mundo Prometido. Escritos sobre Derechos Sociales y Derechos Humanos*, (México, DF: Fontamara, 2009), 203-230.
[268]IACtHR, (Concurring Opinion Judge Sergio García Ramírez) February 28, 2003, Case of "*Five Pensioners" v. Peru*.
[269]IACtHR, (Judgment) July 1, 2009, Case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*.
[270]Ibid, §97.
[271]The IACtHR ruled that: "it is pertinent to note that even though Article 26 is embodied in chapter III of the Convention, entitled 'Economic, Social and Cultural Rights,' it is also positioned in Part I of said instrument, entitled 'State Obligations and Rights Protected' and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in chapter I (entitled 'General Obligations'), as well as Articles 3 to 25 mentioned in chapter II (entitled 'Civil and Political Rights')." Ibid, §100.
[272]Ibid, §103

regarding socioeconomic rights could be subjected to IACtHR review: "the regression is actionable when economic, social and cultural rights are involved."[273]

Although this interpretation for the judicially enforceable character of Art. 26 ACHR was adopted unanimously, *Acevedo Buendía* revealed the dissent regarding the direct enforcement of socioeconomic rights among the IACtHR judges. Judge García Ramírez emphasized in a concurring opinion that the case represented the affirmation of the enforceable character of Art. 26 ACHR before the IACtHR.[274] By contrast, Judge *Ad Hoc* Victor Oscar García warned that the new interpretation of Art. 26 ACHR and the duty over regressive measures actually did not have a direct relation to the case and that it could "lead to interpretations of an important impact on the Inter-American system of human rights; which calls for a more detailed and thorough treatment."[275] Similar to *Five Pensioners*, in *Acevedo Buendía* the IACtHR did not establish a violation of Art. 26 ACHR with regard to the pensions cuts directly involved in the case. Although some legal scholars, such as Thomas Antkowiak, have pointed out the contradictory and inadequate treatment of Art. 26 ACHR in this case,[276] *Acevedo Buendía* does illustrate the IACtHR progressive jurisprudence on socioeconomic rights. Laurence Burgorgue-Larsen has precisely called attention to the "audacity of the court" to establish the judicially enforceable character of socioeconomic rights.[277] This audacious attitude was due to the fact that the IACtHR started to expand its authority through a more expansive interpretation of Art. 26 ACHR. The following development of inter-American case law on socioeconomic rights confirmed Burgorgue-Larsen's analysis.

Right after *Acevedo Buendía*, it is worth mentioning the concurrent opinion of Judge Margarette May Macaulay on *Furlan v. Argentina*,[278] which involved the rights to health and social security within domestic law. Her concurring opinion was very relevant to the normative conception of the direct judicial enforcement of socioeconomic rights by the IACtHR. Judge Macaulay claimed that, with regard to socioeconomic rights, the IACtHR's focus should not be

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[273]Ibid.
[274]IACtHR, (Concurrent Opinion Judge Sergio García Ramírez) July 1, 2009, Case of *Acevedo Buendía et al. v. Peru*.
[275]IACtHR, (Concurrent Opinion Judge *Ad Hoc* Víctor Oscar Shiyin García Toma) July 1, 2009, Case of *Acevedo Buendía et al. v. Peru*.
[276]Antkowiak, Social, Economic and Cultural rights. The Inter-American Court at a Crossroads, 266-270.
[277]Laurence Burgorgue-Larsen, "La Política Jurisprudencial de la Corte Interamericana en Materia de Derechos Económicos y Sociales: de la Prudencia a la Audacia," in *Interamericanización del Derecho a la Salud. Perspectivas a la Luz del Caso Poblete de la Corte IDH*, eds. Mariela Moralez Antoniazzi, Laura Clérico (Querétaro: Instituto de Estudios Constitucionales, 2019) 53-109.
[278]IACtHR, (Concurring Opinion Judge Margarette May Macaulay) August 31, 2012, Case of *Furlan and Family v. Argentina*.

the progressive development or regression of said rights, but "the duty to guarantee them."[279] In line with this, she argued that it was "useful to use the sources which allow for the interpretation of the content of the obligation to guarantee the right to health and the right to social security" involved in *Furlan*. She proposed to extend the interpretation of Art. 26 ACHR based on the *pro persona* principle of Art. 29 (b) ACHR. She also advocated for a systematic interpretation of the ACHR and the PSS. For her, this systematic interpretation could enable these inter-American documents to better fulfill their purpose of guaranteeing socioeconomic rights enforcement within the IAS. Based on a systematic interpretation of both treaties, the IACtHR could be able to "update the normative sense" of Art. 26 ACHR.[280]

Just one year after *Furlan*, the direct enforcement of socioeconomic rights would receive a considerable support through the election of Eduardo Ferrer Mac-Gregor Poissot as an IACtHR judge.[281] Since his election, Judge Ferrer Mac-Gregor has acted as an advocate for the direct enforcement of socioeconomic rights. His opposition to the previous majoritarian understanding of the indirect relation between the ACHR and socioeconomic rights was present in his first concurrent opinion on *Suárez Peralta v. Ecuador.*[282] This case indirectly involved Art. 4 PSS ("Right to Health"). For Judge Ferrer Mac-Gregor, the case offered the opportunity to rule on the right to health in a direct and autonomous form.[283] He argued that a direct judicial enforcement of socioeconomic rights could lead "towards the full normative effectiveness of Article 26" ACHR and grant "transparency and real protection to economic, social and cultural rights."[284] For him, the direct judicial enforcement had a legal basis in the ACHR.[285] He described the relation between Art. 26 ACHR and Art. 19 (6) PSS as an "apparent contradiction."[286] This apparent contradiction required an interpretative exercise in order to

[279]Ibid, §6.
[280]Ibid, §9.
[281]Oscar Parra Vera has called attention to the "protagonist role of Judge Eduardo Ferrer Mac-Gregor" for reaching the majoritarian understanding in favor of the direct enforcement of socioeconomic rights within the IACtHR. See: Oscar Parra Vera, "La Justiciabilidad de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano a la luz del Artículo 26 de la Convención Americana. El Sentido y la Promesa del Caso Lagos del Campos," in *Inclusión, Ius Commune y Justiciabilidad de los DESCA en la Jurisprudencia Interamericana. El Caso Lagos del Campo y los Nuevos Desafíos,* eds. Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Rogelio Flores Pantoja, (Querétaro, Mexico: Instituto de Estudios Constitucionales, 2018), 181-234, 182.
[282]IACtHR (Concurrent Opinion Judge Eduardo Ferrer Mac-Gregor) May 21, 2013, Case of *Suárez Peralta v. Ecuador*.
[283]Ibid, §3.
[284]"[T]he protection of economic, social and cultural rights by indirect means and in connection with other civil and political rights (...) does not provide full efficiency and effectiveness of these rights." Ibid, §11. For him, this necessary link distorted the essence of socioeconomic rights and went against a "clear trend towards the recognition and normative effectiveness of all rights in accordance with the evident progress made at the national level and in international human rights law." Ibid.
[285]Ibid, §33.
[286]Ibid, §§36-56.

bring these two treaties into accord. Following Judge Macaulay's opinion on *Furlan*, he claimed that an update of the normative sense of Art. 26 ACHR was possible and necessary. For him, the direct enforcement of socioeconomic rights was "not only an interpretative possibility, but also a duty towards social justice," which was able "to lead towards the full, real, direct, and transparent realization of all rights, whether civil, political, economic, social, and cultural, without a hierarchy or categorization that undermines their realization."[287]

Judge Ferrer Mac-Gregor's audacious interpretation of the relationship between Art. 26 ACHR and the rights protected by the PSS was contested by other IACtHR judges. Judge Alberto Pérez Pérez claimed that "the references to the right to health in the judgement do not mean that competence is being assumed in relation to that particular right, or to economic, social and cultural rights in general."[288] He also pointed out that the IACtHR could not ignore the provision of Art. 19 (6) PSS. For him, this provision was meant to restrict the competence of the IACtHR to cases involving the right to education and the rights of labor unions. This debate has followed inter-American case law on socioeconomic rights since then. In *Huapaya v. Peru*,[289] Judge Pérez Pérez again voted against the direct enforcement of the right to work (Art. 6 PSS). For him, the right to work was not "included among those recognized by the American Convention on Human Rights, but among those recognized by the Protocol of San Salvador," which is under the special protection established by Art. 19 (6) of said protocol.[290] Moreover, he argued that the direct enforcement lacks any legal basis within inter-American human rights law.[291] Judge Ferrer Mac-Gregor, however, reaffirmed his position in a concurrent opinion issued together with Judge Alberto Caldas.[292]

[287]Ibid, §108. It is worth following the thread of his argument. First, he pointed out that no provision of the Protocol of San Salvador limits the interpretation of Arts. 1 and 2 ACHR (Ibid, §42). Second, based on Art. 29 (b) ACHR, a restrictive interpretation of rights is not possible due to the *pro homine* or *pro persona* principle (Ibid, §44). Eventually, Judge Ferrer Mac-Gregor expanded the scope of Art. 26 ACHR. For him: "economic, social and cultural rights provided for in other laws, including the constitutions of States parties, as well as rights provided for in other conventions to which the State is a party and the American Declaration, are incorporated into Article 26 for its interpretation and enforcement." Ibid, §66.

[288]IACtHR, (Concurrent Opinion Judge Alberto Perez Perez) May 21, 2013, Case of *Suárez Peralta v. Ecuador*.

[289]IACtHR, (Judgement) June 24, 2015, Case of *Canales Huapaya et al. v. Peru*.

[290]IACtHR, (Concurrent Opinion Judge Alberto Pérez Pérez) June 24, 2015, Case of *Canales Huapaya et al. v. Peru*.

[291]"Article 26 of the American Convention does not provide for the specific recognition of economic, social and cultural rights or their inclusion in the protection regime established by the Convention." Ibid, §22.

[292]Although this concurrent opinion did not present any new interpretative element if compared to the concurrent opinion issued on *Suárez Peralta*, its importance was due to the fact that Judge Ferrer Mac-Gregor got an ally towards the majority rule on the autonomous and direct enforcement of socioeconomic rights at the regional level.

In *Gonzáles Lluy v. Ecuador*,[293] the IACtHR established for the first time a violation of an article from the PSS. The case involved the right to education (Art. 13 PSS) of an HIV positive child, who was expelled from a kindergarten because of her health condition. Despite this landmark established violation, the direct enforcement of the right to health (Art. 4 PSS) was contested by Judge Pérez Pérez (with the same arguments from his concurring opinion on *Huapaya* regarding the right to work) and by Judge Humberto Antonio Sierra Porto. Judge Sierra Porto first contested the effectiveness of the direct enforcement of socioeconomic rights. He also contested the legitimacy of direct enforcement, given that Art. 26 ACHR does not establish any list of rights to be protected under the convention. For him, the interpretation in favor of the direct enforcement represented "a fairly extensive task of interpretation."[294] He acknowledged that the IAS could have adopted a less problematic legislative technique than the current "complex system of referrals" between the ACHR and different protocols.[295] However, he emphasized that the direct enforcement of socioeconomic rights relied on a very controversial interpretation of the relationship between these inter-American documents. Hence, he advocated for a "literal interpretation" of the ACHR and the PSS, which, for him, led to the limited competence of the IACtHR to rule on cases involving socioeconomic rights. Finally, Judge Sierra Porto also showed his concerns on a possible delegitimization of the IACtHR towards the IAS member states, which could damage the progress in human rights protection made throughout history.[296]

The majoritarian understanding for the direct enforcement of socioeconomic rights was eventually reached in the decision of *Lagos del Campo v. Peru*.[297] This case involved the right to employment stability of Mr. Alfredo Lagos de Campo, who acted as the president of the electoral committee of a state industrial community and was dismissed due to declarations given in an interview for the local press. The IACtHR established, for the first time within inter-American jurisprudence, a violation of the right to work (Art. 6 PSS) based on an extensive interpretation of Art. 26 ACHR in relation with Article 1 (1) ACHR.[298] In *Lagos del Campo*,

[293]IACtHR, (Judgement) September 1, 2015, Case of *Gonzales Lluy et al. v. Ecuador*.
[294]IACtHR, (Concurring Opinion Judge Humberto Sierra Porto) September 1, 2015, Case of *Gonzales Lluy et al. v. Ecuador*, §7.
[295]Ibid, §9.
[296]Ibid, §32.
[297]IACtHR, (Judgement) August 31, 2017, Case of *Lagos del Campo v. Peru*.
[298]"The State is responsible for the violation of the right to employment stability, recognized in Article 26 of the American Convention, in relation to Articles 1.1, 13, 8 and 16 thereof, to the detriment of Mr. Lagos del Campo, in the terms of paragraphs 133 to 154 and 166 of this judgment." Ibid, 5th resolutive paragraph.

the paragraph that more clearly illustrates the emergence of the direct enforcement of socioeconomic rights reads:

> "It should be noted that the Court has previously established its jurisdiction to hear and resolve disputes relating to Article 26 of the American Convention (…) in respect of which Article 1(1) confers general obligations of respect and guarantee on States (supra para. 142). The Court has also established important jurisprudential developments in this area, in light of various conventional articles. In view of these precedents, this Judgment develops and specifies *a specific violation of Article 26 of the American Convention on Human Rights,* provided for in Chapter III, entitled Economic, Social and Cultural Rights of this treaty."[299] (emphasis added)

After *Lagos del Campos*, the IACtHR established a violation of Art. 26 ACHR in three other cases involving the right to work: *Dismissed Employees of Petroperú v. Peru*,[300] *San Miguel Sosa v. Venezuela*,[301] and *Muelle Flores v. Peru*.[302] These decisions referred to the precedent judgement in *Lagos del Campo.* These references represent a clear effort to consolidate the direct enforcement of socioeconomic rights within inter-American human rights jurisprudence. Based on Laurence Burgorgue-Larsen's analysis of the evolution of conventionality control, we can affirm that *Lagos del Campo* represents a passage to the stage of consolidation of the direct enforcement of socioeconomic rights as a specific form of strong inter-American judicial review.[303] To date, the IACtHR has established, beyond the direct enforcement of the right to work, the direct enforcement of the right to health (Art. 10 PSS). This happened more specifically in two cases: *Poblete Vilches v. Chile*[304] and *Cuscul v. Guatemala*.[305]

[299]Ibid, §154.
[300]IACtHR, (Judgement) November 23, 2017, Case of *Dismissed Employees of Petroperú et al. v. Peru*.
[301]IACtHR, (Judgement) February 8, 2018, Case of *San Miguel Sosa et al. v. Venezuela*.
[302]IACtHR, (Judgement) March 6, 2019, Case of *Muelle Flores v. Peru*.
[303]Based on Burgorgue-Larsen studies of inter-American jurisprudence, we can affirm that *Lagos del Campo* represented the revelation of the direct enforcement of socioeconomic rights within inter-American jurisprudence. This case stands for the emergence of the direct enforcement of socioeconomic rights similar to how *Almonacid* stands for the emergence of conventionality control.
[304]IACtHR, (Judgement) March 8, 2018, Case of *Poblete Vilches et al. v. Chile*.
[305]IACtHR, (Judgement) August 23, 2018, Case of *Cuscul Pivaral et al. v. Guatemala*.

In *Poblete Vilches*, the IACtHR found a violation of the right to health due to the state responsibility for the inadequate conditions of hospitalization of Mr. Vinicio Antonio Poblete Vilches. He was twice hospitalized in a public hospital and died due to the negligence of medical staff. The IACtHR established the direct enforcement of Art. 10 PSS based on a "systematic, teleologic and evolutive interpretation" of inter-American human rights documents, according to which socioeconomic rights were incorporated into the catalogue of rights protected by the ACHR.[306] Moreover, the court distinguished between two types of obligations in relation to the right to health: obligations of immediate effect and progressive obligations.[307] In line with this, the IACtHR ruled that the facts in *Poblete Vilches* involved only immediate obligations regarding the right to health.[308] However, in *Cuscul Pivaral v. Guatemala*, the IACtHR established for the first time a violation of the progressive obligation relating to the right to health. This case involved the right to health of people living with HIV. According to the IACHR, there was a total lack of state medical care for a group of HIV positive people living in poverty. The commission claimed that this omission had a serious impact on their right to health, life and personal integrity.[309] Based on its evolutive jurisprudence on Art. 26 ACHR,[310] the IACtHR established that state authorities violated the progressive development obligation: "The inaction on the part of the state (…) constituted a breach of its obligations regarding the progressive protection of the right to health, in violation of Article 26 of the American Convention."[311]

It is true that in none of the cases mentioned above has the IACtHR ordered state authorities to amend national laws based on inter-American human rights law on socioeconomic rights. However, this seems to be just a matter of time within the evolution of the particular features of the direct enforcement of socioeconomic rights. It is worth remembering that, in contrast to conventionality control, which represents a solid specific form of strong international judicial review, the specific features of the direct enforcement of socioeconomic rights are still emerging within inter-American human rights jurisprudence. Until now, Art. 26 ACHR and the provisions of the PSS have been enforced by the IACtHR in relation with Art. 1 (1) ACHR. The inter-American judicial review of domestic law would

[306]IACtHR, *Poblete Vilches v. Chile*, §103.
[307]Ibid, §104.
[308]Ibid, §134.
[309]IACtHR, *Cuscul v. Guatemala*, §1.
[310]Ibid, §§140-153.
[311]Ibid, §147.

involve that the IACtHR invoke Art. 2 ACHR within case law on socioeconomic rights. There is enough evidence that the IACtHR will adopt this approach, as this study will now explain.

First, Art. 2 PSS repeats the provision of Art. 2 ACHR with regard to the obligation to adopt domestic legislation in accordance with inter-American human rights law. According to it, "[i]f the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions," the IAS member states "undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality."[312] This provision arguably gives a legal basis for the inter-American judicial review of domestic laws on socioeconomic rights. In fact, given that the IACtHR started to interpret the relationship between the ACHR and the PSS in an evolutive, teleologic and systematic way as it claimed, for instance, in *Poblete Vilches*, the court is not far from practicing the review of domestic legislation within the direct enforcement of socioeconomic rights.

Second, the IACtHR at least once addressed the relationship between the direct enforcement of socioeconomic rights and Art. 2 ACHR. In its *Advisory Opinion OC-23/17* ("The Environment and Human Rights"),[313] the IACtHR established that, according to Art. 2 ACHR, the IAS member states have a duty to adopt domestic legislation to guarantee the effectiveness of the rights provided by the ACHR. For the IACtHR, this state obligation to bring domestic legislation into accordance with the ACHR "is not limited to the constitutional or legislative text," but should extend to "all legal provisions with a regulatory nature and translate into effective practical application".[314] In line with this, the court established that the states should regulate the protection of the environment having in mind this duty to adopt proper legislation in order to avoid significant damage to the environment.[315] Moreover, the IACtHR established the essential elements of domestic regulation referring to environmental impact studies, which, according to the court, should include, among other things, specific procedural rules and the duties that authorities and decision-makers should follow when analyzing projects

[312]Protocol of San Salvador, art. 2.
[313]IACtHR, (*Advisory Opinion OC-23/17*) November 15, 2017, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights).
[314]Ibid, §146.
[315]Ibid, §147.

with a significant environmental impact.[316] Here, for instance, lies the scope for the court to review domestic laws that do not abide by these criteria.

Finally, some IACtHR judges have also already addressed the relationship between the direct enforcement of socioeconomic rights and Art. 2 ACHR. Judge Eduardo Ferrer Mac-Gregor, for instance, has claimed that "the next challenge for the Inter-American Court is to develop a full model of the conventionality control doctrine" based on socioeconomic rights as a means "to improve the compliance of human rights law in domestic frameworks with a new conception of social justice."[317] What does he mean by that? It seems that he intends to relate the judicial enforcement of socioeconomic rights to the practice of conventionality control by the IACtHR. This could involve the practice of inter-American judicial review of domestic laws on socioeconomic rights. Judge Ferrer Mac-Gregor intends to strengthen the direct enforcement of socioeconomic rights by adding to its features the practice of inter-American judicial review of domestic law. Given that he has been a very influential judge in the development of inter-American human rights jurisprudence, this interpretation is also an important factor to the emergence of this second specific form of strong inter-American judicial review.

3.3. Conclusion: The specific forms of strong inter-American judicial review

This chapter has described the two specific forms of strong inter-American judicial review of domestic laws: conventionality control and the direct enforcement of socioeconomic rights. In order to understand better these specific forms, this chapter found it necessary to describe both their emergence and the evolution of their specific features throughout inter-American jurisprudence. Conventionality control emerged in response to the underenforcement of civil and political rights following the democratization of some previously authoritarian Latin American countries. These authoritarian regimes adopted amnesty laws as a condition for democratization and as a means to avoid punishment by the democratic governments that followed them. The conventionality control of these laws represented the core of the first major phase of inter-American jurisprudence, i.e., the transitional justice phase. Although

[316]Ibid, §150.
[317]Eduardo Ferrer Mac-Gregor, foreword to *The Social Rights Jurisprudence in the Inter-American Court of Human Rights. Shadow and Light in International Human Rights,* Isaac de Paz González, (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2018).

conventionality control has emerged within inter-American jurisprudence on amnesty laws, the IACtHR has also refined its specific features in cases that did not involve amnesty statutes.

Throughout several cases, the IACtHR refined the procedural aspects of conventionality control, which contributed to its practical enforcement within domestic law. Although the court eventually extended conventionality control to every national authority within the IAS, the domestic judicial authorities are the most prominent agents of conventionality control due to their competence to review legislation with general effect within some Latin American constitutional orders. Some IACtHR decisions and concurrent opinions of IACtHR judges have addressed other important procedural elements of conventionality control, like the type of domestic laws that could give rise to conventionality control and the type of inter-American documents that could serve as a reference point for its practice. In view of these specific features, conventionality control can be described as the domestic judicial authorities' international obligation to review national law that is not in accordance with inter-American human rights law. Should they face an inconsistent statute or provision, domestic judicial authorities should refrain from enforcing it or should even opt to invalidate it based on inter-American human rights law. By doing so, state authorities would not only be complying with the ACHR, but also serving as auxiliary bodies to the IACtHR. This auxiliary work is essential for the effectiveness of conventionality control due to the fact that the IACtHR cannot amend domestic laws per se according to the ACHR. Hence, the court has ordered national judicial authorities to do so based on their obligation to comply with inter-American human rights law and, most importantly, with inter-American jurisprudence.[318]

Beyond conventionality control, the direct enforcement of socioeconomic rights represents another specific form of inter-American judicial review that is still emerging within inter-American human rights jurisprudence. The IACtHR has gradually extended its authority towards the adjudication of socioeconomic rights. These rights are not directly mentioned by the ACHR and, due to this absence of direct reference, the IACtHR initially enforced them within cases that involved violations of civil and political rights. However, the commission recently started referring cases that argued violations of Art. 26 ACHR and, throughout the evolution of inter-American case law on socioeconomic rights, the IACtHR eventually established the direct enforcement of these rights. The IACtHR first recognized an individual

[318]The following chapter will address the disputed existence of strong international judicial review due to this effectiveness issue.

and collective dimension of socioeconomic rights. Then, it established that the progressive development obligation under Art. 26 ACHR is subject to the general obligations of Arts. 1 (1) and 2 ACHR, which meant that this obligation had a judicially enforceable character. Finally, the IACtHR established a direct violation of the right to work (Art. 6 PSS) for the first time. Since then, the IACtHR has tried to consolidate the direct enforcement of socioeconomic rights by establishing other direct violations of socioeconomic rights. Beyond the right to work, the court has established a direct violation of the right to health (Art. 10 PSS) within socioeconomic rights case law.

The IACtHR has still not ordered national authorities to amend domestic legislation on socioeconomic rights. This is due to the late emergence of the direct enforcement of socioeconomic rights when compared to conventionality control. However, there is evidence that the court will adopt this second specific form of strong inter-American judicial review. Three points illustrate this argument more clearly. First, the practice of strong inter-American judicial review involves the enforcement of Art. 2 ACHR. The PSS has a similar provision in its Art. 1 ("Obligation to Adopt Domestic Measures"). Based on the new interpretation of the relationship between these two inter-American documents, the IACtHR already has a legal basis for the practice of the second specific form of strong inter-American judicial review. Second, the court specifically referred to the relationship between domestic law on socioeconomic rights and Art. 2 ACHR in the *Advisory Opinion OC-23/17* ("Human Rights and the Environment"). In this advisory opinion, the court established essential elements that should be included in the domestic laws that regulate projects with a significant environmental impact. Herein lies the scope for the court to review domestic laws that do not include these essential features. Finally, it was worth mentioning the opinion of an influential IACtHR judge about the necessity of developing a stronger relationship between conventionality control and the direct enforcement of socioeconomic rights. This opinion arguably advocates for adopting strong inter-American judicial review within the direct enforcement of socioeconomic rights.

In Chapter I, inter-American judicial review has been described as a fundamental element in the top-down evolution of Latin American cosmopolitan constitutionalism. Strong review is simultaneously the product and an agent of this evolution. In light of the study of inter-American jurisprudence, we can better understand why this new feature of Latin American cosmopolitan constitutionalism has caused much controversy among legal authorities and scholars. The evolution of conventionality control and the direct enforcement of socioeconomic

rights illustrates how the IACtHR has practiced a transfer of powers from the domestic courts to the inter-American level. The practice of strong inter-American judicial review of legislation has served as the main mechanism for this transfer of constitutional powers. However, as we have seen in Chapter II, domestic courts are likely to oppose this evolution of inter-American human rights jurisprudence. Cases like *Gomes Lund* and *Herzog* reveal that constitutional courts may want to keep their constitutional authority over domestic legislation, as they have traditionally done within Latin American constitutionalism. Latin American constitutional courts, despite being obliged to comply with inter-American jurisprudence, may resist the practice of strong inter-American judicial review of domestic laws.

As it has become clear within the previous chapters, cosmopolitan convergence is not only the result of the top-down emergence of human rights legislation and jurisprudence in Latin America. Bottom-up elements have also been of fundamental importance for Latin American cosmopolitan constitutionalism. Resistance to cosmopolitan convergence ultimately reveals the lack of a strong normative sense with regard to the practice of inter-American judicial review on the part of national authorities, more specifically constitutional courts. However, advocates for the practice of strong inter-American judicial review often ignore its controversial character within Latin American constitutionalism. One such example is a practical guide to the practice of conventionality control that was edited by the Inter-American Institute of Human Rights.[319]

According to this practical guide, the practice of conventionality control is a logical consequence of a legal education based on topics such as the relationship between domestic and international human rights law, the structure of the IAS and the member states' responsibilities under the ACHR.[320] However, it is difficult to deny the fact that the practice of strong inter-American judicial review is still a relatively recent feature within Latin American constitutionalism. Its development by the IACtHR, its adoption by domestic authorities, and the scholarly debate are still not settled. It is also difficult to deny that even a basic education on the legal subjects mentioned by the practical guide would inevitably lead to serious discussions about the legitimacy and effectiveness of inter-American judicial review within the current phase of inter-American human rights law. The practice of strong inter-American

[319]Instituto Inter-Americano de Derechos Humanos (IIDH), Manual Auto-Formativo para la Aplicación del Control de Convencionalidad Dirigido a Operadores de Justicia, (San José da Costa Rica: IIDH, 2015).
[320]"The basic education on these topics creates the general positive attitude that leads public authorities to face conventionality control more naturally." Ibid, 69.

judicial review is not self-evident, and some scholars should stop pretending that it is. The previous chapters have illustrated the demand for a normative theory of inter-American judicial review that is compatible with the evolution of Latin American constitutionalism. The initial step towards this normative theory is studying the legitimacy and effectiveness of international judicial review in more general terms. After assessing the normative grounds for the practice of international judicial review, it is necessary to look for the most legitimate and effective approach that the IACtHR can adopt when practicing inter-American judicial review of domestic laws. These tasks will guide the following chapters of this study.

IV. The Normative Grounds for the Practice of Strong International Judicial Review

4.1. The controversial existence of strong international judicial review

The previous chapter has described the emergence of two specific forms of inter-American judicial review of domestic laws. The most appropriate description of these specific forms involves the distinction between strong and weak judicial review. Legal scholars have distinguished between strong and weak forms of judicial review within domestic law. Strong judicial review refers to the final say that courts have on the validity of legislation. Within weak judicial review, courts may defer to the political review of legislation carried out by legislative or administrative instances. Within international law, strong international judicial review also relates to the judicial interpretation of domestic legislation, although it may possibly involve the review of judicial decisions and executive acts within the multilevel system of human rights protection. This study focuses on the practice of inter-American judicial review of domestic legislation. In view of this, the adjective *strong* generally refers to the final say that the IACtHR may have on the review of legislation without considering the position of national authorities, most importantly domestic legislatures and constitutional courts.[321] The courts' final say may range from just a more concrete interpretation of domestic law to even striking down domestic statutes. This possibility of invalidating domestic statutes is the most problematic feature of the practice of strong inter-American judicial review as this chapter will explain.

As Başak Çali has pointed out, "the use of the term 'judicial review' in the context of the judicial powers of international courts" is something "more contemporary" and "its emergence can be linked to the rise of the regional human rights courts of Europe, the Americas and Africa."[322] In contrast to domestic judicial review, international judicial review seems to

[321]Jeremy Waldron has found this distinction between strong and weak judicial review useful for debating the legitimacy of this institution: "In a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Moreover, courts in this system have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue preclusion a law that they have refused to apply becomes in effect a dead letter. A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether." Jeremy Waldron, "The Core of the Case Against Judicial Review," Yale Law Journal 115, (2006), 1346-1406, 1354. Mark Tushnet has defined strong-form judicial review as "a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities." Mark Tushnet, Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law, (Princeton, NJ: Princeton University Press, 2008), 33.

[322]Başak Çali, "International Judicial Review," in *Handbook on Global Constitutionalism*, eds. Anthony F. Lang, Antje Wiener, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2017) 291-303, 291.

necessarily adopt the form of weak review. Çali has also addressed this issue when she claimed that "international judicial review does not raise the same intensity of problems that are highlighted in the context of strong domestic judicial review" and that "in all its manifestations, international judicial review is a weak form of judicial review seen from the perspective of domestic constitutional orders."[323]

There are some major obstacles to describing the practice of strong inter-American judicial review that relate to the institutional position of regional human rights courts, as Çali has noted. These obstacles seem to make lawyers reluctant to incorporate insights from a rich debate on judicial review at the domestic level to the discussion of its inter-American practice. Overcoming them is necessary in order to bring new horizons to the debate on the legitimacy and effectiveness of the practice of inter-American judicial review. One well-known argument against the existence of strong international judicial review is the one that points to the fact that the IACtHR relies on the domestic level for compliance with its decisions. How could this international court have the final say on the review of domestic legislation if the enforcement of its decisions relies on the agency of domestic authorities? Due to its institutional standing, inter-American judicial review seems to necessarily represent a weak form of judicial review.

Another common argument against the existence of strong international judicial review in general is that jurisprudence is not recognized as an immediate source of international law.[324] This argument is based, for instance, on a disputed interpretation of Art. 38 (d) of the statute of the International Court of Justice (ICJ), according to which the ICJ uses "judicial decisions and the teachings of the most highly qualified publicists of the various nations, *as subsidiary means for the determination of rules of law*" (my emphasis).[325] Based on the subsidiary character of jurisprudence, the IACtHR could not rely on its own jurisprudence to justify the practice of strong international judicial review of domestic laws. By doing so, the IACtHR assumes that inter-American jurisprudence is a primary source of international law. For some scholars, this assumption is wrong based on the nature of international law and, more specifically, of international human rights law.[326]

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[323]Ibid, 293.
[324]On this issue, see: David Kennedy, "The Sources of International Law," in *International Legal Structures*, (Baden-Baden: Nomos, 1987), 11-107. See also: *The Oxford Handbook on The Sources of International Law*, eds. Samantha Besson, Jean D'Aspremont, (Oxford: Oxford University Press, 2017).
[325]Statute of the International Court of Justice, art. 38 (d).
[326]See, for instance, Ezequiel Malarino, "Acerca de la Pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Proteción de Derechos Humanos para los Tribunales Judiciales Nacionales," in

However, based on the evolution of international human rights adjudication, legal scholars should arguably change their perception that international jurisprudence involves only weak forms of judicial review. As Başak Çali and Anne Koch have suggested, there are currently three different forms of international judicial review: weak, intermediate and strong.[327] For these authors, the level of strength of judicial review depends on some factors. If an international human rights adjudicative body just establishes a rights violation but does not establish the appropriate remedies or monitors the reparation of this violation, we can say that it is practicing weak international judicial review. If this court establishes a rights violation along with its consequent potential remedies and forms of prevention, it is practicing intermediate international judicial review. Finally, if this court establishes a violation and the potential remedies to this violation, and monitors compliance with the judgement, it can be said to be practicing strong international judicial review. These categories are useful to describe the evolution of international adjudication, but the strength of inter-American judicial review also relates to the effectiveness of inter-American jurisprudence within domestic law.

It is difficult to ignore the influence of inter-American human rights jurisprudence in domestic law throughout recent decades in Latin America. Paying attention to this influence leads us to conclude that, if the IACtHR does not have a final say on domestic pieces of legislation within the IAS, it has at least a very persuasive voice on this matter. Its influence has been exercised over all domestic branches, which contributes to the argument that strong-form review has emerged within the evolution of inter-American human rights jurisprudence. This can be illustrated by *Radilla Pacheco v. Mexico*[328] and the domestic responses to this case in Mexico.[329] This case involved a victim of enforced disappearance caused by military personnel. The IACtHR established that the military courts had no authority over the case and that it had to be reported to ordinary courts. Moreover, the IACtHR established the duty to practice conventionality control in order to ensure the enforcement of the decision. The Mexican authorities basically ignored the IACtHR judgement and, after *Radillha Pacheco*, the

Sistema Interamericano de Proteción de los Derechos Humanos y Derecho Penal Internacional, (Montevideo: Konrad-Adenauer Stiftung, 2010).

[327]Başak Çali, Anne Koch, "Explaining Compliance: Lessons from Civil and Political Rights," in *Social Rights Judgements and the Politics of Compliance. Making it Stick*, eds. Malcolm Langford, César Rodríguez-Garavito, Julieta Rossi, (Cambridge et al.: Cambridge University Press, 2017), 43-74, 57.

[328]IACtHR (Judgement) November 23, 2009, *Radilla Pacheco v. Mexico*.

[329]On this issue, see: Eric Tardif, The *Radilla Pacheco v. Mexico* Case. A Paradigmatic Shift Towards Conventionality Control in Mexico, in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano, (Cambridge et al.: Intersentia, 2015), 677-692.

country was found in violation with the ACHR in 3 more cases within just 2 years.[330] Eventually, the Mexican Supreme Court decided to study the case with greater attention and it eventually became very influential in Mexican constitutional law.

The case was responsible for the adoption of several important domestic measures. First, the IACtHR decision in *Radilla Pacheco* was one of the determining factors of the 2011 constitutional reform that granted human rights a constitutional rank within Mexican law. As this study has already pointed out, this reform modified the title of Chapter 1 of the constitution (from "Of the individual guarantees" to "Of human rights and their guarantees"), as well as modifying several constitutional articles. The case was also responsible for introducing conventionality control to the Mexican authorities. The Mexican state established a training program for all justice operators and reported to the IACHR that, until September 2015, 62.440 people were trained in, among other issues, the practice of conventionality control.[331] Eventually, the Mexican Supreme Court established the binding character of inter-American jurisprudence, even in cases in which Mexico is not a party. Finally, the case was also important for the measures adopted by the Mexican executive power, since in 2014 the government withdrew of its reservations to three treaties adopted in the framework of the OAS.[332]

This Mexican case strengthens the argument that, based on the evolution of Latin American cosmopolitan constitutionalism, the institutional condition of the IACtHR should not prevent the analysis of strong-form inter-American judicial review. As Çali has also noted, "of the three human rights systems," the IACtHR "has adopted the broadest and the strictest conception of international judicial review."[333] It is also worth mentioning that Çali and Koch have claimed that the IACtHR "constitutes an institution that comes closest to an international version of strong judicial review," given that this court "spells out the measures states have to implement in order to remedy a given violation in an exceptionally detailed manner, thereby leaving no room for any further deliberation as to what the appropriate form of implementation might be."[334] In line with this, strong judicial review has become common practice within inter-

[330]IACtHR (Judgement), August 30, 2010, Case of *Fernandez Ortega et al. Mexico*; IACtHR (Judgement), August 31, 2010, Case of *Rosendo Cantu et al. v. Mexico*; IACtHR (Judgement) November 26, 2010, Case of *Cabrera García and Montiel Flores v. Mexico*.
[331]IACHR, Country Report: The Human Rights Situation in Mexico, 2015, §85; available at: http://www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf.
[332]See: IACHR Welcomes Mexico's Withdrawal of Treaty Reservation, July 22, 2014, available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/076.asp.
[333]Çali, International Judicial Review, 298.
[334]Çali, Koch, Explaining Compliance: Lessons from Civil and Political Rights, 61.

American jurisprudence and it currently stands as the most prominent element in the top-down evolution of Latin American cosmopolitan constitutionalism. Despite its arguably advantages for human rights enforcement, legal scholars should address the legitimacy and effectiveness of strong inter-American judicial review with greater attention.

4.2. Inter-institutional interaction as a common feature of domestic and international judicial review

The discussion about the legitimacy and effectiveness of international judicial review raises similar questions to those raised in the discussion of its practice within domestic law. This section first addresses inter-institutional interaction as a common feature of domestic and international judicial review. This common feature underscores the importance of the debate on the practice of judicial review within domestic law for the discussion of international judicial review. This chapter will then address in greater detail the reasons for and against the practice of domestic judicial review and how these reasons can also be useful for assessing the legitimacy of strong international judicial review.

Although it is said that the national and international levels of adjudication have more differences than similarities, it is worth paying attention to one remarkable common feature they have in terms of judicial review. Similar to domestic judicial review, international judicial review necessarily has a multi-institutional character. Within domestic law, judicial review necessarily involves inter-institutional interaction between courts and legislatures.[335] When courts invalidate laws or order their amendment within domestic law, legislatures should respond to these judicial decisions and adopt new legislation on the specific issues that were judicially reviewed. Judicial review is an essential feature of deliberative democracies, given that it promotes this inter-institutional interaction on legislative matters. As is clear from previous sections of this study, when the IACtHR orders that national authorities should review domestic laws, it lacks the power to enforce this decision. The IACtHR necessarily relies on the national authorities, i.e., domestic courts and legislatures, in order to guarantee the effectiveness of the practice of inter-American judicial review. Without these national authorities, inter-American judicial review is merely wishful thinking.[336] This makes inter-

[335]See, for instance: Mattias Kumm, "Constitutional Courts and Legislatures. Institutional Terms of Engagement," Católica Law Review 2, no. 1, (2017), 55-66.
[336]As Alfredo Vítolo has rightly pointed out in: Alfredo M. Vítolo, "Una Novedosa Categoría Jurídica: el 'Querer Ser.' Acerca del Pretendido Carácter Normativo Erga Omnes de la Jurisprudencia de la Corte Interamericana de

institutional interaction a necessary feature of international judicial review. Due to this common multi-institutional character of domestic and international judicial review, studies of inter-institutional dialogue referring to domestic judicial review can also be useful for analyzing the practice of international judicial review.

Throughout the evolution of inter-American human rights jurisprudence, the inter-institutional interaction between the IACtHR and national authorities has become as complex as it is within domestic constitutional orders. While the domestic practice of strong judicial review might raise questions of the legitimacy of courts striking down majority-based statutes, at the international level, it is not surprising that some commentators have raised arguments against inter-American judicial review. Inter-American judicial review of domestic law has brought about a new relationship between the IACtHR and the highest domestic courts and national legislatures. This new inter-institutional relationship is the main focus of the following parts of this study. This study argues that, if legal scholars pay greater attention to inter-institutional interaction, they might be able to find the most appropriate approach to this new relationship between the IACtHR and national authorities. In fact, trying to find the best normative model of inter-American judicial review necessarily means trying to find the most appropriate relationship between the IACtHR and the highest national authorities.

Yet, it is worth mentioning some particular issues regarding the legitimacy and effectiveness of strong international judicial review. It is especially due to the institutional position of international courts that such particular issues have emerged. Addressing the legitimacy of international adjudication, Armin Von Bogdandy and Ingo Venzke have addressed what they called "a widespread sense of unease about the legitimacy of international courts."[337] They have described "specific legitimation problems of international adjudication" due to different factors like institutional asymmetries and the fragmentation of international law.[338] Institutional asymmetries refer to the fact that international treaties usually provide a legal basis for international adjudication.[339] In contrast to domestic statutes, international treaties are not so readily amended within legislative processes. This means that the "democratic potential of parliamentary legitimation can develop less with an international treaty

Derechos Humanos. La dos Caras del Control de Convencionalidad," Pensamiento Constitucional 18, (2013), 357-380.

[337]Armin Von Bodgdandy, Ingo Venzke, In Whose Name? A Public Law Theory of International Adjudication, trans. Thomas Dunlap, (Oxford: Oxford University Press, 2014), 214.

[338]Ibid, 119-135.

[339]Ibid, 122.

than with domestic law."[340] Moreover, the processes of negotiating, amending and ratifying international treaties are usually slow because they depend on qualified majorities or special procedures within international and, in turn, domestic legislatures. Von Bogdandy and Venzke have concluded that "[t]he democratic premise that judicial law-making can be politically corrected with democratic majorities is therefore hardly respected with international adjudication."[341] Moreover, the intense fragmentation of international law does not contribute to a higher democratic pedigree of international adjudication.[342] For them, this fragmentation may hinder "democratic generality" and become "a problem for the democratic legitimation of international court's public authority."[343]

There are also important issues regarding the effectiveness of international judicial review. The effectiveness of judicial decisions is a much more salient issue in international contexts of adjudication than it is within domestic constitutional orders. Although national authorities underenforce judicial decisions in an everyday basis and this fact might even sound banal to professional lawyers, with regard to strong international judicial review, nonenforcement or underenforcement might represent a much more salient threat to the overall effectiveness of a specific international legal system. This effectiveness question may also be intimately related to the legitimacy questions associated with international adjudication. National state authorities may try to oppose decisions by international judicial authorities by means of nonenforcement. From a bottom-up perspective, nonenforcement or underenforcement of international decisions may even be perceived as a legitimate form of opposition to strong international judicial review. The fact that strong review does not leave scope for critical positions to international judicial decisions is indeed a delicate issue. Should domestic state authorities blindly abide by international decisions or should they seek another form of interaction with international judicial authorities by means of nonenforcement of jurisprudence?

Even if some form of critical approach to strong inter-American judicial review might be desirable, it is hard to deny that massive underenforcement would lead to the overall

[340]Ibid, 123.
[341]Ibid, 125.
[342]On this issue, see also: Martti Koskenniemi, "International Legislation Today: Limits and Possibilities," Wisconsin International Law Journal 23, (2005), 61-92. Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, Geneva, 2006.
[343]Von Bodgdandy, Venzke, In Whose Name? A Public Law Theory of International Adjudication, 134-135.

ineffectiveness of inter-American human rights jurisprudence. This is particularly problematic in the case of the IACtHR, given that this court has heavily relied on the practice of strong review of domestic laws. A salient argument against strong international judicial review is that it can lead to backlash against international courts. If the IACtHR does not adopt a principled practice of strong review, national authorities may start to massively underenforce the court's decisions. This could cause considerable harm to the further evolution of inter-American human rights jurisprudence. However, inter-American judicial authorities are not supposed to tolerate the domestic violations of human rights, since this attitude would harm the integrity of a system that was created to protect people from these same violations. The practice of strong inter-American judicial review must therefore strike a balance between the legitimacy and effectiveness issues. Trying to strike this balance involves the discussion of the normative grounds for the practice of inter-American judicial review. Due to the notable common feature between the national and international contexts of adjudication, namely inter-institutional interaction, legal scholars may gain a better perspective on international judicial review if they pay close attention to the rich discussion of inter-institutional interaction within domestic law.

4.3. The legitimacy and effectiveness of judicial review within domestic law

Judicial review has been responsible for courts acquiring a more relevant position within domestic constitutional democracies. There has been contestation to this evolution of constitutional democracies within legal scholarship. Ran Hirschl, for instance, has addressed this phenomenon as a problem of "juristocracy."[344] In fact, many prominent legal scholars have emphasized that constitutional rights enforcement should not be restricted to what constitutional courts say the constitution is. One well-known example within legal scholarship is "popular constitutionalism," which is a theory of constitutional rights enforcement that does not privilege judicial supremacy and, in the words of one of its most prominent proponents, even intends to take the constitution away from the courts.[345] The fact is that strong judicial review is necessarily related to questions of the legitimacy of this legal practice, because it

[344]Ran Hirschl, Towards Juristocracy. The Origins and Consequences of the New Constitutionalism, (Cambridge: Harvard University Press, 2007). Hirschl has called attention to the political side of this delegation of powers to the judiciary in many constitutional democracies. See: "The Political Origins of Constitutionalization," in Ibid, 31-49.

[345]Mark Tushnet, Taking the Constitution Away from the Courts, (Princeton: Princeton University Press, 1999). On popular constitutionalism, see also: Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review, (New York: Oxford University Press, 2004).

arguably involves the review of democratically enacted laws practiced by non-democratically elected adjudicative bodies. Strong review triggers a discussion of the counter-majoritarian difficulty that courts face when they review majority-based legislation, as Alexander Bickel has prominently pointed out.[346] This counter-majoritarian difficulty represents a general argument against the practice of judicial review within domestic law.

Several legal scholars have referred to the counter-majoritarian difficulty in many different ways. One prominent example is Jeremy Waldron's article *The Core of the Case Against Judicial Review*.[347] Waldron aimed to offer arguments against judicial review in its general features, i.e., not relying on a specific context or history of this legal practice.[348] For him, yielding to ordinary majority-based decision-making is the best way to resolve rights-based disagreements among citizens in democracies that fulfill some minimal requirements.[349] His claim is based on two main factors: i) strong judicial review does not "provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights," but "distracts them with side-issues about precedent, texts and interpretation;"[350] and ii) strong review's political illegitimacy relies on the fact that this legal practice privileges "majority voting among a small number of unelected and unaccountable judges" at the same time that "it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."[351]

Another example of a critical approach to judicial review is offered by Richard Bellamy's concept of political constitutionalism.[352] Bellamy has advocated for limits on the practice of judicial review within liberal democracies. For him, "ambitious schemes of judicial review" that ignore the complexity involved in rights' interpretation and enforcement "risk making judicial decisions appear arbitrary, thereby threatening the legitimacy of the constitution."[353] Despite all the disadvantages pointed out by Waldron and Bellamy, many

[346]Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2nd ed. (New Haven: Yale University Press, 1986).
[347]Jeremy Waldron, "The Core of the Case Against Judicial Review," Yale Law Journal 115, (2006), 1346-1406.
[348]"What is needed is some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society;" Ibid, 1352.
[349]They are: i) democratic institutions that work reasonably well, ii) courts that work reasonably well, iii) a commitment with the idea of minority and individual rights, and iv) persistent good-faith disagreements about rights in society. See, Ibid, 1360.
[350]Ibid, 1353.
[351]Ibid.
[352]Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy, (Cambridge: Cambridge University Press, 2007).
[353]Ibid, 16.

scholars have advocated for the advantages brought about by the practice of judicial review of legislation within constitutional democracies. It is interesting to address what could justify the practice of judicial review within domestic law according to these scholars and how these arguments might be influential in the debate on international judicial review. As we will see, some scholars have advocated that judicial review is not necessarily an anti-democratic institution. Some of these scholars have even described judicial review as an essential feature of constitutional democracies.

Hans Kelsen was a traditional defender of the practice of judicial review of legislation.[354] He claimed that "[i]nsofar as it makes sure that statutes come into existence in conformity with the constitution (…) constitutional adjudication serves the function of an effective protection of the minority against assaults on the part of the majority."[355] In another passage, Kelsen associated the judicial review of legislative procedures to a systemic design of institutional control that is decisive for the fate of modern democracies. For him, "democracy without control is impossible in the long run."[356] Based on this fact, minorities should be able to appeal to constitutional courts, either directly or indirectly, for the review of legislation that exposes them to the "arbitrariness of the majority."[357]

More recently, Mattias Kumm has described the importance of judicial review as a feature of constitutional democracies as comparable to that of the liberal right to vote.[358] For him, "judicial review is not only compatible with liberal democracy;" it also "institutionalizes a right to justification that should be regarded as basic an institutional commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote."[359]

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[354]Hans Kelsen, *Verteidigung der Demokratie. Abhandlungen zur Demokratietheorie*, eds. Matthias Jestaedt, Oliver Lepsius, (Tübingen: Mohr Siebeck, 2006). See also the English translation of some of Kelsen's articles by Lars Vinx: *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans. and ed. Lars Vinx, (Cambridge: Cambridge University Press, 2015). The methodological justification of the practice of judicial review within Kelsen's *pure theory of law* will not be addressed here. On this issue, see: Carlos Santiago Nino, The Constitution of Deliberative Democracy, (New Haven, London: Yale University Press, 1996), 189-196.

[355]Hans Kelsen, "The Nature and Development of Constitutional Adjudication," in *The Guardian of the Constitution*, ed. Lars Vinx, 22-78, 71.

[356]Hans Kelsen, Verteidigung der Demokratie, 209.

[357]Ibid.

[358]Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," Law & Ethics of Human Rights 4, no. 2, (2010), 142-175. Kumm has referred to proportionality-based judicial review as an appropriate system for the enforcement of the right to justification.

[359]Ibid, 165. "The right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying liberal-democratic constitutionalism as an equal right to vote." Ibid, 170. Kumm's interpretation of the right to justification is also useful for addressing the problem of juristocracy relating to human rights judicial enforcement as this section of the study will later address.

Likewise, Alon Harel and Adam Shinar have argued that judicial review is the institutional embodiment of the right to a hearing.[360] For them, this right to a hearing is essential for the protection of individual rights in every legal system given that "it grants individuals an opportunity to challenge decisions that impinge (or may have impinged) upon their rights, to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation."[361] Although Harel and Shinar have affirmed that non-judicial institutions, e.g., the legislature, can enforce the right to a hearing, courts are arguably specially designed to fulfill this task within constitutional democracies. In line with this, they have argued that any institution that aims to give effect to the right to a hearing should operate in a judicial manner, i.e., it should resemble a court.[362]

Other legal scholars have argued that judicial review can play an important role in constitutional democracy; however, these scholars have granted less weight to the importance of judicial review as an institution of liberal constitutionalism. Ronald Dworkin, for instance, addressed judicial review based on the forms of democracy currently existing in some countries. For him, the practice of judicial review necessarily leads to the concept of a constitutional court as a "forum of principle," according to which it "should make decisions of principle rather than policy."[363] In light of contemporary democratic systems, he claimed that "judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself."[364] Nevertheless, it is important to emphasize that, for Dworkin, judicial review is not an indispensable feature of democracies. In his last book, he claimed that "judicial review is one possible (though I emphasize, only one possible) strategy for improving a government's legitimacy"[365] and that if "representative government is indeed necessary (…) [t]hat is not true of judicial review."[366]

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[360]Alon Harel, Adam Shinar, "The Real Case for Judicial Review," in *Comparative Judicial Review*, eds. Erin F. Delaney, Rosalind Dixon, (Cheltenham, Northampton: Edward Elgar Publishing, 2018), 13-35, 17.
[361]Ibid, 13-14.
[362]"[T]o the extent that other institutions can conduct a hearing, it is only because they operate in a judicial manner and thereby functionally exercise review in the same manner as courts." Ibid, 19.
[363]Ronald Dworkin, A Matter of Principle, (Cambridge: Harvard University Press, 1985), 69. Dworkin was referring to the US Supreme Court in this passage.
[364]Ibid, 70.
[365]Ronald Dworkin, Justice for Hedgehogs, (Cambridge: Harvard University Press, 2011), 385.
[366]Ibid, 398. Despite all his reservations with regard to the necessity of judicial review, he rejected any general characterization of it as democratically deficient: "I am denying what many lawyers and political scientists claim: that judicial review is inevitably and automatically a defect in democracy. But it does not follow that any democracy has actually benefited from the institution." Ibid, 399.

So now we have some different interpretations of the legitimacy and effectiveness of judicial review within domestic law. Some scholars warn us of the illegitimacy and risks inherent in the practice of judicial review of legislation, while others describe it as an indispensable feature of constitutional democracies or at least one possible way to strengthen the government's legitimacy. How could these different interpretations be useful for the discussion about the legitimacy and effectiveness of international judicial review? This section has argued that the reasons related to the necessity and suitability of domestic judicial review might enable lawyers to better assess the normative grounds for the practice of international judicial review within the IAS. In fact, inter-American judicial review of domestic laws has become an indispensable feature for Latin American democracies throughout the evolution of Latin American cosmopolitan constitutionalism, as the previous chapters have explained. As this study will explain in Chapter VI, the inter-American institutions have traditionally faced a difficult context for human rights enforcement in Latin America. Illiberal and authoritarian practices still persist in some Latin American countries and this justifies the demand for some form of control body of domestic legislative practices, given that authoritarianism is more often than not institutionalized via legislation. Inter-American judicial review of domestic laws could guarantee the close control of the consistent evolution of domestic legislation according to inter-American human rights law. In line with this, strong inter-American judicial review could represent an important factor against domestic authoritarian practices that flagrantly violate the civil and political rights protected under inter-American human rights law. It is mostly based on this persistence of domestic authoritarian practices in Latin America that, for this study, the interpretations in favor of judicial review are more useful for establishing a principled practice of strong inter-American judicial review. Due to the necessity of control of authoritarian legislative practices in Latin American countries, this study will try to strengthen the arguments for the legitimacy of strong judicial review in the following.

The first step is to address how courts can serve as a control body within deliberative democracies without necessarily becoming anti-democratic institutions. Some scholars have claimed that courts can strengthen the legitimacy of democratically enacted legislation through the practice of judicial review by guaranteeing the participatory rights of citizens. Here it is worth mentioning how Jürgen Habermas has addressed this issue. For him, "only the procedural conditions for the democratic genesis of legal statutes secures the legitimacy of enacted law."[367]

[367]Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy, trans. William Rehg, (Cambridge, MA: MIT Press, 1996), 263.

In view of this, a constitutional court plays an important role: to guarantee that citizens enjoy private and public autonomy.[368] For Habermas, the separation of powers based on the classical liberal paradigm is no longer appropriate in light of the current form of fundamental rights.[369] He has emphasized that private autonomy is currently endangered both by the state and by economic and social factors. This is because these factors affect how citizens can exercise their communicative and participatory rights in democracies. For Habermas, the constitutional court should devote particular attention to "the contents of disputed norms primarily in connection with the communicative presuppositions and procedural conditions of the legislative process."[370] For him, "such a *procedural understanding of the constitution* places the problem of legitimating constitutional review in the context of a theory of democracy" (emphasis in original).[371] This changes the usual interpretation of judicial review as a necessarily anti-democratic legal practice within deliberative democracies.

Habermas has mentioned John Hart Ely's theory as an appropriate description of the relationship between judicial review and communicative and participatory rights.[372] Ely's theory of judicial review grants prominence to participatory rights, given that, according to it, discriminatory laws violate the principle of equal treatment not only with regard to the principle's content. These discriminatory laws "result from a political process whose *democratic procedural conditions* have been violated" (emphasis in original).[373] Based on this fact, the legitimacy of judicial review relates to "the conditions for the democratic genesis of laws."[374] For Habermas, Ely has given "the liberal mistrust of tyrannical majorities a surprising procedural twist."[375] Although Habermas has criticized Ely's theory in some important respects, he has approved of this procedural twist. Based on the value of judicial review for guaranteeing the conditions of deliberative democracy, Habermas has concluded that "we cannot carry on the discussion of the supreme court's activism or self-restraint in abstracto."[376] Given that judicial review is essential for the promotion of citizen's private and public autonomy (and also of their relationship) within the system of rights, "a rather bold

[368]"The constitutional court should keep watch over just that system of rights that makes citizens' private and public autonomy equally possible." Ibid.
[369]For him, "the function of basic rights can no longer rely on the sociological and economic assumptions built into the liberal paradigm of law." Ibid.
[370]Ibid, 264
[371]Ibid.
[372]John Hart Ely, Democracy and Distrust. A Theory of Judicial Review (Cambridge: 1980).
[373]Habermas, Between Facts and Norms, 265.
[374]Ibid.
[375]Ibid.
[376]Ibid, 279.

constitutional adjudication is even required in cases that concern the implementation of democratic procedure and the deliberative form of political opinion- and will-formation."[377]

In a nutshell, Habermas and Ely help us understand that the practice of judicial review is not necessarily anti-democratic and can, under certain conditions, even strengthen the legitimacy of the exercise of public authority, which also includes the enactment of legislation. Yet, it is worth addressing a final question relating to the legitimacy and effectiveness of strong judicial review: How can judicial review strengthen the legitimacy of exercising public authority without necessarily becoming a form of tyrannical judicial power? The answer to this question brings us to the concept of the right to justification, which this study will explain in the following.

The right to justification with regard to the exercise of public authority has been widely discussed in different fields of research. References to the right to justification have become an essential feature of liberal political theories since John Rawls described his concept of public reason and how legitimate law depends on it.[378] For Rawls, reasonable pluralism is a basic feature of constitutional democracies, which makes all comprehensive doctrines of truth in politics impossible. Rawl's political liberalism has replaced these comprehensive doctrines with an idea of the "politically reasonable."[379] For Rawls, fundamental political questions should be decided by reasons that might be shared by all citizens as free and equals.[380] This is directly related to the legitimacy of the practice of judicial review.[381]

Rawls affirmed that "in a constitutional regime with judicial review, public reason is the reason of its supreme court."[382] This court, as the higher judicial interpreter, should adopt public reason when engaging in legal interpretation, given that public reason gives legitimacy to law.

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[377]Ibid, 280.
[378]John Rawls, Political Liberalism. Expanded Edition, (New York: Columbia University Press, 2005).
[379]Ibid, 47-54.
[380]"Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason. (…) Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification." Ibid, 137.
[381]On the relationship between public reason and the practice of judicial review, see: Wojciech Sadurski, "Judicial Review and Public Reason," in *Comparative Judicial Review*, eds. Erin F. Delaney, Rosalind Dixon, (Cheltenham, Northampton: Edward Elgar Publishing, 2018), 337-356.
[382]Rawls, Political Liberalism, 231. For Sakurski, "Rawls makes clear that the directive of PR [public reason] applies primarily to judges, and then to legislators and citizens only when constitutional essentials (a concept that Rawls fails to define the contours of) are implicated;" Sadurski, Judical Review and Public Reason, 339. For Sadurski, this court-centeredness of Rawls' theory is responsible for "taking away responsibility for argument in terms of PR from other political institutions and citizens." Ibid, 340.

Rawls imagined the situation in which a strong majority of the electorate seizes power and starts to pass legislation against public reason. This majority can eventually "make the constitution conform to its political will" and, in this way, greatly affect higher law.[383] In this context, Rawls argued that the supreme court should be able to "by applying public reason (…) prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way."[384] He refused to describe the practice of judicial review of legislation in this situation as anti-democratic. For him, the practice of judicial review was "indeed antimajoritarian with respect to ordinary law" but it was not antimajoritarian with respect to higher law because it accords "with the constitution itself and with its amendments and politically mandated interpretations."[385]

Based on Rawl's theory we can conclude that public reason is a legitimizing factor for the review of legislation within domestic law.[386] However, how does the idea of public reason relate to human rights adjudication? How could human rights give rise to this contestation of the exercise of state authority by means of public reason? Rainer Forst has addressed this issue and explained that behind all claims based on human rights lies the basic right to justification.[387] He has opposed the description of a relative character of human rights as a category of rights typical of Western societies. For him, the demand for human rights is something that comes from within the structure of society and that simultaneously aims to influence this structure. He has explained that the claim for human rights emerges "where people ask for reasons, for justification for certain rules, laws and institutions, and where the reasons they receive are no longer sufficient."[388] In line with this, Forst has described the right to justification as "an unconditional claim to be respected as someone to whom one owes reasons for actions, rules or structures to which he or she is subject."[389] The right to justification relates to human rights as "the most general and basic claim of every human being, which others, people or states, cannot reject."[390]

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[383]Rawls, Political Liberalism, 233.
[384]Ibid.
[385]Ibid, 234.
[386]Sadurski has concluded that the idea of public reason can "translate into a constitutional doctrine under which improper legislative motives or purposes contaminate law with unconstitutionality, even if we may approve of the effects of such laws." Sadurski, Judicial Review and Public Reason, 353.
[387]Rainer Forst, "Das Grundlegende Recht auf Rechtfertigung. Zu einer Konstruktivistischen Konzeption von Menschenrechten," in *Das Recht auf Rechtfertigung. Elemente einer Konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp, 2007), 291-327, 293. There is an English translation to this text. Unfortunately, I did not have access to this English version.
[388]Ibid, 299
[389]Ibid, 300.
[390]Ibid. It is based on this essential feature of claims based on human rights that Forst has described the language of human rights as the language of social emancipation. Ibid, 303.

Forst gives us a sound philosophical grounding for how the right to justification lies behind every claim based on human rights. In fact, within legal scholarship, the right to justification has been generally related to the justification of state interference with individual's basic or fundamental rights. There is a wide range of approaches to this issue, but the most discussed one comes from the relationship between judicial review and the proportionality test as applied to fundamental rights adjudication.[391] Robert Alexy's well-known formula of fundamental rights adjudication is arguably the most prominent approach to proportionality-based judicial review.[392] Alexy has argued that "the enactment of constitutional rights binding all states powers entails the opening of the legal system to the system of morality, an opening which is both *rational* and *can be mastered by rational means*" (my emphasis).[393] This relation between adjudication and rationality is what drove him to look for a rational means of constitutional rights adjudication.[394] His approach is intimately related to principles theory, according to which he distinguished between rules as definitive commands and principles as norms that demand that something be realized "to the greatest extent possible given the legal and factual possibilities."[395] Based on this optimization requirement, Alexy has argued that balancing is the most appropriate form of interpretation and enforcement of conflictual principles.[396] This leads to a necessary relation between principles and the proportionality test. For him, judicial authorities should review whether, in case of conflictual principles, state interference with individual rights is in accordance with the subprinciples of suitability, necessity, and proportionality in the narrower sense. Only if state interference succeeds at these three different stages can it be considered valid.

Alexy's approach has, in turn, given rise to several theories of constitutional rights interpretation. Despite the prominence of his approach, it is worth noting that his is not the only paradigm of constitutional rights adjudication adopted by courts around the globe with regard

[391]For Mattias Kumm, the proportionality test "provides a structure for the justification of an act in terms of public reason." Kumm, The Idea of Socratic Contestation, 150.
[392]Robert Alexy, A Theory of Constitutional Rights, trans. Julian Rivers, (Oxford et al: Oxford University Press, 2002).
[393]Ibid, 4.
[394]See also: Robert Alexy, "Proportionality and Rationality," in *Proportionality. New Frontiers, New Challenges*, eds. Vicki C. Jackson, Mark Tushnet, (Cambridge: Cambridge University Press, 2017), 13-29.
[395]Alexy, A Theory of Constitutional Rights, 47.
[396]"The determination of the appropriate degree of satisfaction of one principle relative to the requirement of other principles is brought about by balancing. Thus, balancing is the specific form of application of principles;" Alexy, Proportionality and Rationality, 14.

to proportionality test.[397] As Jacob Bomhoff has noted, the practice of balancing means different things in different contexts.[398] However, the successful migration of the proportionality test and of balancing to several constitutional orders around the globe does tell us much about the structure of human rights and its relationship with the right to justification.[399] This has been well explained by Mattias Kumm's approach to the right to justification and its consequences for human rights judicial enforcement.[400] Kumm has argued that "judges do not interpret rights: they assess justifications."[401] For him, the success of the proportionality test as a form of legal interpretation did not happen by chance: "The apparent 'casual override' that is reflected in the ubiquitous use of the proportionality test is connected to the distinctive contestatory and justificatory function of rights."[402] He has described the proportionality test as "a test of public reason," which is intimately related to the structure of human rights as rights that "simultaneously stand above politics and are at the heart of the political process."[403]

State authorities are challenged to concretize and specify human rights, and Kumm has explained that "once we specify a right in the context of an ordinary political process, we no longer call the concrete specification a human right, but a statutory or administrative right."[404] However, he has argued that human rights could not serve "as the normative foundation of the whole of law and politics"[405] and that "any version of the total rights conception must be wrong."[406] For him, any theory of human rights should acknowledge the existence of reasonable disagreement among free and equals and the possible variances in human rights adjudication. This insight adds an important feature to the relationship between human rights and the right to justification: the reasonable exercise of judicial authority. In this context, the task of courts that adjudicate human rights is to police the boundaries of the reasonable, "focusing merely on

[397]We should also not forget that Alexy's approach was intended to be a theory of the constitutional rights of the German *Grundgesetz*, which, according to his own words, "is neither a philosophy of constitutional rights independent of positive law, nor a sociological, historical, or political theory." Alexy, A Theory of Constitutional Rights, 3.
[398]Jacco Bomhoff, Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse, (Cambridge: Cambridge University Press, 2013).
[399]Kai Möller, The Global Model of Constitutional Rights, 1st ed., (Oxford: Oxford University Press, 2012).
[400]Mattias Kumm, "The Turn to Justification: On the Structure and Domain of Human Rights Practice," in *Human Rights: Moral or Political?*; ed. Adam Etinson (Oxford, New York: Oxford University Press, 2018), 238-261.
[401]Ibid, 250.
[402]Ibid.
[403]Ibid, 260.
[404]Ibid, 259.
[405]Ibid, 240. He has raised the question: "if human rights cover the whole domain of law and politics, what space is there for the give and take of democratic politics and of disagreement between parties, social groups, and citizens?" Ibid.
[406]Ibid.

reasonableness understood as the justifiability in terms of public reason."[407] They should not "tell public authorities what justice and good policy requires" but review measures that "impose burdens on some people, when no sufficiently plausible defense in terms of public reason can be mounted for doing so."[408]

Kumm's approach tries to address the inflationary use of human rights parlance within legal interpretation, which has had consequences for the structure and exercise of public authority in general. The right to justification gives courts legitimacy to practice judicial review but it has been difficult to adopt a reasonable practice of judicial authority within constitutional democracies due to the inflationary use of human rights. This is due to the fact that human rights inflation can lead to an exponential increase in the authority of courts. Given that courts should be responsible for assessing whether state interference with individual rights is justified, they have become exponentially empowered.[409] The paradox of this omnipresence of judicial authority is that this omnipresence is not reasonable under the concept of liberal deliberative democracy, according to which courts are only one of the many important instances of lawmaking and legal interpretation. The total conception of human rights leads, paradoxically, to a very illiberal conception of government marked by judicial activism.

Herein lies the importance of the relation between the right to justification and the legitimacy and effectiveness of judicial review of legislation as practiced within constitutional and human rights adjudication. The various approaches to judicial review and the right to justification addressed above can illustrate how the practice of judicial review can be legitimate within deliberative democracies. Judicial review can even become a valuable means of strengthening the legitimacy of the exercise of public authority. However, trying to limit the inflationary use of human rights language and, in turn, the exercise of judicial authority are also important features of the jurisprudential approaches to judicial review above described. Legal authorities should be aware of the risks of the inflationary use of judicial review based on

[407]Ibid, 254.
[408]Ibid.
[409]This relates to Alexander Somek's description of constitutionalism 2.0, according to which the rational exercise of public authority has gained prominence and empowered courts to practice judicial review especially within fundamental rights adjudication. See: Alexander Somek, The Cosmopolitan Constitution, (Oxford: Oxford University Press, 2014), 79-133. The exponential increase in the authority of the German Federal Constitutional Court illustrates this new form of constitutionalism well. On this issue, see: *Das Entgrentze Gericht: Eine Kritische Bilanz nach Sechzig Jahren Bundesverfassungsgericht*, eds. Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, Christoph Schönberger, (Berlin: Suhrkamp, 2011). See also: Michaella Hailbronner, Traditions and Transformations: The Rise of German Constitutionalism, (Oxford: Oxford University Press, 2015). See also this useful compilation of German constitutional law jurisprudence: *German Constitutional Law. Introduction, Cases, and Principles*, eds. Christian Bumke, Andreas Voßkuhle, (Oxford: Oxford University Press, 2019).

extensive human rights interpretation. This applies especially to the practice of international judicial review of domestic law by the IACtHR. Despite the fact that this court may legitimately function as a control body of domestic laws adopted by Latin American national authorities, the IACtHR should also be aware that the inflationary interpretation of human rights represents an unreasonable exercise of international judicial authority. Due to this fact, the IACtHR should seek to limit the practice of strong inter-American judicial review in a reasonable way. As this study will later explain, this reasonable way involves the evolution of inter-American human rights legislation and jurisprudence.

In conclusion, several theories help us understand that the practice of judicial review does not necessarily go against the concept of deliberative democracy and can even strengthen the legitimacy of exercising public authority. Theories that link judicial review to participatory rights illustrate this character of judicial review in our contemporary systems of fundamental rights especially well. However, any theory of judicial review should also address the necessity for a reasonable exercise of judicial authority. It is a fact that constitutional courts have experienced an increase in their authority due to fundamental rights adjudication. Trying to find reasonable terms for the exercise of judicial authority is a fundamental feature of concepts like the right to justification. Until now this chapter has addressed the traditional debate on domestic judicial review among prominent legal philosophers and pointed to how this debate can also be useful for discussing the new inter-institutional interaction brought about by the practice of inter-American judicial review. The following section will briefly address a new variant of the practice of judicial review that has emerged in some Latin American countries. This new variant involves the review of legislation on socioeconomic rights at the domestic level. The concept of transformative constitutionalism has been an important element in this particular evolution of domestic constitutional jurisprudence, which later also had consequences for the inter-American level of human rights enforcement.

4.4. Latin American transformative constitutionalism and socioeconomic rights judicial enforcement

Transformative constitutionalism came to prominence within constitutional scholarship based on the South African experience with this concept. In South Africa, the concept was introduced by Karl Klare, who claimed that the legal authorities had the potential to promote

social change and argued for a new methodology of legal interpretation under the rule of the new South African constitution.[410] Klare compared the transformative methodology under the new constitutional order to the formalist methodology previously applied under the apartheid regime in South Africa. After his seminal work was published, the concept arguably became the most widely discussed topic for South African constitutionalism. As it happens to every prominent concept, transformative constitutionalism has undergone some shifts and even South African scholars have admitted that there is "no single stable understanding of transformative constitutionalism."[411] Despite this difficulty of finding a core concept, transformative constitutionalism has reached other constitutional orders such as Brazil, India and Colombia.[412]

In Latin America, the concept has recently received more attention from legal authorities and scholars for several reasons. The first obvious reason is that Latin American countries share similar conditions of poverty, inequality and institutional failure with other societies within the *Global South*.[413] Latin American authorities and scholars have looked at transformative constitutionalism as an interesting normative concept for addressing the challenging conditions the region presents for constitutional rights enforcement. Poverty, inequality and corruption have reached acute levels in Latin America and transformative constitutionalism has gained a reputation as a theory of legal interpretation that does not ignore this difficult context for rights enforcement but tries to integrate it within jurisprudential approaches.

There are some other general features responsible for this successful migration of transformative constitutionalism. Since its emergence, transformative constitutionalism in Latin America has been opposed to mere transitional constitutionalism, which is the type of constitutional theory concerned mostly with civil and political rights enforcement. These rights were usually disrespected by authoritarian regimes in Latin America's recent past and therefore they deserved greater attention on the part of legal authorities and scholars after the democratization of Latin American countries. By contrast, transformative constitutionalism focuses primarily on socioeconomic development. In fact, as Oscar Viena Vilheira and Dimitri

[410]Karl Klare, "Legal Culture and Transformative Constitutionalism," South African Journal on Human Rights 14, 1998, 146-188.
[411]Pius Langa, "Transformative Constitutionalism," Stellenbosch Law Review 17, no. 3, (2006), 351-360, 351.
[412]*Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, eds. Oscar Vilhena Vieira, Upendra Baxi and Frans Viljoen, (Johannesburg: Pretoria University Law Press, 2013); *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, eds. Armin von Bogdandy et al., (Oxford: Oxford University Press, 2017).
[413]See: *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia*, ed. Daniel Bonilla Maldonado, (New York: Cambridge University Press, 2013).

Dimoulis have noted, the word "development" appears several times in the text of Latin American transformative constitutions: 35 times in the 1988 Brazilian constitution, 52 times in the 1991 Colombian constitution, 73 times in the 2008 Ecuadorian constitution, and 75 times in the 2009 Bolivian constitution.[414] In a nutshell, transformative constitutionalism aims at achieving a form of substantial equality under the rule of law, which makes the concept very appealing for constitutional lawmaking and interpretation in Latin American countries.[415]

It is true that, as Roberto Gargarella has pointed out, transformative constitutionalism has long been present in Latin American constitutional orders.[416] For him, transformative constitutionalism does not represent a new form of Latin American constitutionalism, because it is possible to trace the emergence of *social constitutionalism* back to the 20th century. Based on the history of Latin American constitutionalism, he has affirmed that "what is presented as new turns out to be, in general, all too 'old'."[417] The beginning of social constitutionalism was related to the adoption of new constitutional texts that included a broad catalog of socioeconomic rights like the 1917 Mexican constitution, the 1937 Brazilian constitution, the 1938 Bolivian constitution and the 1945 Ecuadorian constitution.[418] However, the novelty of Latin American transformative constitutionalism does not lie in legislation, but in the legal enforcement of transformative constitutions. A prominent feature of Latin American transformative constitutionalism has been the strong judicial enforcement of socioeconomic rights.[419] This judicial enforcement can include strong remedies in case of violation of these rights and also the practice of strong judicial review of legislation on socioeconomic rights, given that the minimum and maximum amounts of public spending on education, health and social security, for instance, are usually defined by domestic laws. It is the judicial enforcement of socioeconomic rights that is truly innovative in the contemporary form of Latin American

[414]Oscar Vilhena Vieira, Dimitri Dimoulis, "Transformative Constitutions as a Tool for Social Development," FGV Direito SP Law School Legal Studies Research Paper Series, no. 154, 2018, 15; available at SSRN: https://ssrn.com/abstract=3197957.
[415]Upenda Baxi has called attention to this fact in his analysis of the Brazilian, South-African and Indian constitutional orders. According to him, transformative constitutionalism stands "not just (for) an orderly enhancement of governance powers direct to fostering national 'development', but rather a redemptive potential construed in terms of effective implementation of human rights, especially social and economic rights." Upenda Baxi, "Preliminary Notes on Transformative Constitutionalism," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, eds. Oscar Vilhena, Upendra Baxi and Frans Viljoen, (Johannesburg: Pretoria University Law Press, 2013), 18-47, 30.
[416]Roberto Gargarella, "The 'New' Latin American Constitutionalism. Old Wine in New Skins," in *Transformative Constitutionalism in Latin America*, eds. Von Bogdandy et al. (Oxford: Oxford University Press, 2017), 211-234.
[417]Ibid, 212.
[418]Ibid, 220-221.
[419]Oscar Vilhena Vieira, "Transformative Constitutions: Prominent Courts," *in Comparative Constitutional Law in Latin America*, eds. Rosalind Dixon, Tom Ginsburg, (Cheltenham, UK, Northampton, MA: Edward Elgar Publishing, 2017), 253-275.

constitutionalism.[420] The evolution of domestic constitutional adjudication in countries like Brazil and Colombia can illustrate this new prominent feature of transformative constitutionalism in the region.

The Colombian constitutional court has established two main principles relating to the enjoyment of socioeconomic rights: the *vital minimum* principle and the principle of *the social state of law*.[421] This constitutional court established the vital minimum principle based on general principles (e.g., human dignity) and on the socioeconomic rights catalog of the Colombian constitution, which encompasses, for instance, the right to health, social security, and housing. Based on the vital minimum principle, individuals "have a right to receive at least the minimum level of subsistence and enjoyment of rights needed to survive under dignified conditions."[422] This principle settled the controversy about the judicially enforceable character of socioeconomic rights and turned these rights into individually enforceable ones by means of the *tutela* writs within Colombian law.[423] The principle of a social state of law, in turn, was established based on Art. 1 of the Colombian constitution and also became highly influential in constitutional adjudication.[424] According to it, the state should provide the conditions necessary for a dignified life to the people and resolve the inequalities in society. This principle led to the increasing authority of the Colombian constitutional court to demand that the state undertake actions to alleviate poverty and ensure substantive equality in the country.

The Brazilian STF has also consistently enforced socioeconomic rights. According to Oscar Vilhena, the Brazilian constitutional court "issued significant decisions obliging states and municipalities to spend constitutional mandatory financial resources on education and also obliging these entities to provide places for children in the school system."[425] According to

[420]When referring to judicial activism, Gargarella has admitted that there have been modest but significant change in Latin American constitutionalism. Gargarella, The 'New' Latin American Constitutionalism. Old Wine in New Skins, 232.
[421]Manuel Cepeda Espinosa, David Landau, Colombian Constitutional Law. Leading Cases, (New York: Oxford University Press, 2017), 147-212.
[422]Ibid, 147. The authors have traced the definition of the vital minimum principled in: Colombian Constitutional Court, (Judgement) June 24, 1992, Case of *T-426*.
[423]"The invention of the right to a minimum level of subsistence has played two major functions in the Court's case law. First, from a procedural perspective, it allowed for the enforcement of various social rights via the tutela, which was initially left ambiguous by the constitutional text;" "[s]econd, from a substantive perspective, the right to minimum level of subsistence has played a prioritarization function for social rights in Colombian constitutional law." Ibid, 150.
[424]Ibid, 148. The authors have traced the emergence of the principle of a social state of law in: Colombian Constitutional Court, (Judgement) September 4, 2003, Case of *T-772*.
[425]Oscar Vilhena Vieira, "Descriptive Overview of the Brazilian Constitution and Supreme Court," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, eds. Oscar Vilhena, Upendra Baxi and Frans Viljoen, (Johannesburg: Pretoria University Law Press, 2013), 102.

Octavio Motta Ferraz, ordinary courts have followed the example of the constitutional court and adopted an individually enforceable rights approach with regard to the right to health.[426] Based on this approach, ordinary courts have not deferred to the other political branches and have rarely hesitated to issue strong remedies in case of violation of socioeconomic rights, regardless of questions like the scarcity of fiscal resources.[427]

Transformative constitutionalism has led to a high level of litigation of socioeconomic rights in some Latin American countries. The impact of the established individually enforceable character of the right to health in Colombia and in Brazil illustrates this particularly well. According to Cepeda Espinosa and Landau, the number of *tutela* writs requesting protection for the right to health quadrupled in Colombia between 1999 and 2005.[428] In Brazil, Octavio Motta Ferraz has described that, since the mid-1990s, "an avalanche of lawsuits followed" lower courts' decisions to establish the state's obligation to provide HIV-infected individuals with the newest (and often the most expensive) drugs available.[429] Later, the lawsuits went beyond HIV-AIDS treatment and started to encompass claimants' rights to all sorts of surgical procedures and drugs for various diseases like diabetes, Alzheimer's and multiple sclerosis.[430]

The strong judicial enforcement of socioeconomic rights has become the most salient feature of contemporary Latin American transformative constitutionalism. It first emerged within domestic constitutional adjudication in some Latin American countries and, later, it has also emerged within inter-American human rights jurisprudence. The direct enforcement of socioeconomic rights as a specific form of strong inter-American judicial review can be seen as the most recent element in the evolution of Latin American transformative constitutionalism. Nowadays transformative constitutionalism can involve the empowerment of domestic courts and, most importantly for this study, the empowerment of the IACtHR. Until now this chapter has addressed how the empowerment of national courts by means of practicing judicial review can be democratically legitimized. This chapter has explained how judicial review can even strengthen the democratic pedigree of domestic democracies. This means that judicial review can be reconciled with the concept of deliberative constitutionalism, which means that several

[426]Octavio Luiz Motta Ferraz, "Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, eds. Oscar Vilhena et al., (Johannesburg: Pretoria University Law Press, 2013), 375-404.
[427]Ibid, 390.
[428]Espinosa, Landau, Colombian Constitutional Law. Leading Cases, 173.
[429]Ferraz, Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa, 391.
[430]Ibid.

institutions are responsible for amending and interpreting the constitution. Moreover, this chapter has addressed the problem of judicial activism by introducing concepts like the right to justification, according to which courts should reasonably review the validity of democratically enacted legislation when adjudicating human and constitutional rights.

However, there is still a remaining point regarding the value of international judicial review for deliberative constitutionalism: why should international courts be allowed to have a say within the inter-institutional interaction brought about by judicial review? What could justify adding an international human rights court to this traditionally domestic constitutional practice? This question relates to explanations of why constitutional lawyers have turned to global constitutionalism, which this study will outline in the following.

4.5. The turn to global constitutionalism: the argument for multilevel inter-institutional interaction

As Chapter III has explained, conventionality control and the direct enforcement of socioeconomic rights have become essential elements in inter-American human rights jurisprudence. This study has already underscored their relevance as elements in the top-down evolution of Latin American cosmopolitan constitutionalism. Conventionality control was the first specific form of strong inter-American judicial review. The IACtHR has expressly addressed domestic courts as prominent actors of conventionality control, which renders domestic judicial authorities an extension of the IACtHR judges. The direct judicial enforcement of socioeconomic rights represents another specific form of strong inter-American judicial review. The judicially enforceable character of socioeconomic rights at the inter-American level has been consistent with domestic constitutional practices that advocate that courts should have a say within the debate on the enforcement of these rights. As the previous section has explained, Latin American transformative constitutionalism has been a decisive element in this evolution of inter-American human rights jurisprudence. Transformative constitutionalism has led courts to take a more active role in the enforcement of socioeconomic rights, which can involve the practice of domestic judicial review of legislation pertaining to these rights. In line with this, the IACtHR seems to be following the same path as domestic courts with regard to socioeconomic rights adjudication.

Conventionality control and the direct enforcement of socioeconomic rights are jurisprudential elements that have strengthened the authority of the IACtHR. What could justify this stronger authority? What could justify this IACtHR's new place among domestic institutions, which were previously the only ones responsible for interpreting and amending domestic constitutional norms? In a general sense, the justification of this IACtHR's stronger authority relates to what Alon Harel has described as the rise of global constitutionalism within constitutional law scholarship.[431] He has noted that some constitutional lawyers have taken a recent turn to global constitutionalism due to their skepticism about the capacity of domestic norms to guarantee the legitimate exercise of public authority in the global order. This skeptical attitude towards domestic constitutionalism has led some scholars to propose strengthening the role of international institutions. For Harel, this turn is justified based on the fact that individuals are freer in a global order because their rights are drafted and protected at the domestic and international levels. This is not related to the fact that their rights may be *better* protected by international institutions than by national institutions: it relates to the fact that "the protection of their rights does not depend upon the good will of national courts or other institutions in charge of interpreting the constitution."[432] For Harel, the turn to global constitutionalism "protects us from the prospects of living at the mercy of the drafters and interpreters of national constitutions."[433]

Harel's argument has a particular relevance for Latin American countries, whose governments have time and again failed to protect their citizens' rights. The persistence of authoritarian governments in the region is evidence of this constant failure particularly with regard to the protection of civil and political rights. Nevertheless, Harel's justification for the turn to global constitutionalism refers to an obligation that can be generally applied to all states within the international community. Ronald Dworkin referred to this obligation when he proposed a new philosophy for international law.[434]

Dworkin argued that there is a general obligation for each state, as a coercive system, to improve its political legitimacy. From this general obligation at the domestic level, there follows an obligation to improve the overall international system: "If a state can help to facilitate an international order in a way that would improve the legitimacy of its own coercive

[431]Alon Harel, Why Law Matters, (Oxford: Oxford University Press, 2014), 185-190.
[432]Ibid, 187-188.
[433]Ibid, 188.
[434]Ronald Dworkin, "A New Philosophy for International Law," Philosophy & Public Affairs 41, no. 1, (2013), 2-30.

government, then it has a political obligation to do what it can in that direction."[435] He claimed that, in light of the contemporary form of the international order, there is "a duty to pursue available means to mitigate the failures and risks of the sovereign-state system."[436] He defined this duty as "the most general structural principle and interpretative background of international law."[437]

Following Harel and Dworkin, the turn to global constitutionalism is necessary in order to strengthen the type of international order that can reciprocally improve the political legitimacy of states as coercive governments. National constitutions do no suffice to provide this type of system and this fact justifies the necessity of protecting rights also at the international level. One of the consequences of the turn to global constitutionalism is the obligation imposed on domestic authorities to interact with their international peers in order to fulfill the general structural principle. This involves the national authorities' obligation to interact with institutions like international human rights courts. The mandatory character of this interaction should not be taken for granted given that this interaction may strengthen the authority of international human rights courts over time. Although the turn to global constitutionalism establishes the necessity of multilevel inter-institutional interaction, it does not say much about how this inter-institutional interaction should work. How should interpreters from different levels deal with possible conflicts between national and international norms without assuming opposing positions, i.e., the positions of cosmopolitan internationalists against insular constitutionalists?

Eyal Benvenisti and Alon Harel have, for instance, proposed a discordant parity model of interaction between national and international institutions.[438] For them, there has to be "an equal status of international law and constitutional law," given that "international norms and constitutional norms compete with each other and seek to dominate the normative sphere."[439] The most useful feature of their discordant parity model is to acknowledge the duty of "each norm-interpreter, be it either an international law or a domestic law interpreter" to "give due account to the interpretation disputed by its national and international peers."[440] Their

[435]Ibid, 17.
[436]Ibid, 19.
[437]Ibid.
[438]Eyal Benvenisti, Alon Harel, "Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity," International Journal of Constitutional Law 15, no. 1, (2017), 36-59.
[439]Ibid, 39.
[440]Ibid, 57.

discordant parity model, however, should arguably be rethought in some points that involve the justification of strong international judicial review as a legitimate form of inter-institutional interaction between inter-American and national authorities within the IAS.

From a normative perspective, it is insufficient to state that "conflict is a permanent and desirable feature of the legal world."[441] Lawyers should seek the right answers, or at least the best possible answers, to these types of conflicts. In fact, this is exactly why courts exist. The purpose of international and national courts is not merely to observe the legal world without deciding which interpretation is the right answer. In this context, conflict *has to be resolved*. Given this structural feature of the legal world, multilevel inter-institutional interaction has to be able to settle some interpretative conflicts between national and international norms. Over time, this inter-institutional interaction is able to strengthen the normative dimension of rights, which will have an impact on decisions in future cases. The adoption of more specific legislation within national and international law, and the existence of jurisprudential precedents on both levels are among the main legal sources that can serve as meaningful reference points for settling interpretative disputes.

In line with this, the outcomes of the multilevel inter-institutional interaction have the potential to legitimize the practice of strong international judicial review. This represents an empowerment of international courts, but the source of this stronger authority is also based on bottom-up elements in this multilevel relationship. This has been the case of Latin American cosmopolitan constitutionalism, whose evolution has led to the strengthening of the authority of the IACtHR over Latin American constitutional norms interpreters. The defining question is in which cases the practice of strong inter-American judicial review is the most appropriate solution for the normative dispute between national and international norms. This question involves the evolution of domestic and inter-American legislation and jurisprudence pertaining to the dispute in a specific case. For some disputes, it is arguably unreasonable that national authorities should be allowed to disregard settled interpretations that are based on pieces of legislation and legal precedents. Due to the fact that national and inter-American authorities have settled some interpretative issues, the practice of strong inter-American judicial review is, in principle, legitimate. However, national authorities should be allowed to have more discretion when interpreting some human and constitutional rights due to the lack of a stronger

[441] "The conflict between international and national norms need not be resolved; in fact, it needs to be maintained and intensified. This conflict is a permanent and desirable feature of the legal world." Ibid, 58.

normative dimension of the interpretative disputes involved in a case. This justifies the practice of weak international judicial review, according to which a greater margin of appreciation is given to national norm-interpreters.

The last paragraph has begun to outline the mixed-form theory of inter-American judicial review, which is the main concern of Chapter VI in this study. This theory addresses the problem with the fact that the IACtHR has heavily relied on the practice of strong international judicial review throughout inter-American human rights jurisprudence. There are several critiques of this jurisprudential approach, which the following section of this chapter will address.

4.6. Contesting international juristocracy in Latin America

There are different interpretations of the emergence of strong international judicial review within inter-American human rights jurisprudence. According to the defenders of the *Ius Constitutionale Commune* in Latin America (hereinafter ICCAL), the practice of strong inter-American judicial review could contribute to a better interaction between domestic and international authorities within the IAS, which, in turn, would lead to the emergence of an *ius constitutionale commune* (a type of constitutional common law) in Latin America. In line with this, the defenders of ICCAL have underscored the positive aspects of the practice of conventionality control and the direct enforcement of socioeconomic rights. This enthusiasm about the practice of strong inter-American judicial review can be observed in the opinions of some prominent scholars and authorities. One of these enthusiastic lawyers is Judge Eduardo Ferrer Mac-Gregor. In one of his most relevant individual concurring opinions, the Mexican judge claimed that the IAS was moving towards a more integrated system of human rights protection by means of the practice of conventionality control. For him, conventionality control "is progressively forging an authentic *Ius Constitutionale Commune Americanum* as a substantial and indissoluble nucleus to preserve and guarantee the human dignity of the inhabitants of the region."[442] He argued that conventionality control is one of the most important elements in the construction of *ius constitutionale commune* in Latin America, given

[442]IACtHR (Concurring Opinion Judge Eduardo Ferrer Mac-Gregor on Monitoring Compliance with Judgement) March 20, 2013, Case of *Gelman v. Uruguay*, §100.

that it promotes more judicial dialogue within the IAS.[443] Some defenders of the ICCAL have also claimed that law and legal scholarship can make a difference in the social agenda in Latin America.[444] In line with this, transformative constitutionalism scholarship represents the efforts on the part of many actors that "want to change the political and social realities of Latin America in order to create the general framework for the full realization of democracy, the rule of law, and human rights."[445] Despite these arguments in favor of the practice of the specific forms of strong inter-American judicial review, there are opposing views on their practice within the IAS.

Jorge Contesse, for instance, has offered a very critical interpretation of the legitimacy and effectiveness of conventionality control.[446] He has argued that conventionality control lacks solid legal reasoning based on the ACHR and also reveals a problematic understanding of the IACtHR as a constitutional tribunal for Latin America.[447] Moreover, conventionality control could prompt a backlash within the IAS. For Contesse, conventionality control has been an illegitimate intervention of the IACtHR into Latin American countries' domestic affairs.[448] For him, the establishment of conventionality control reveals a reluctance of the IACtHR to adopt mechanisms of subsidiarity in human rights adjudication. He has also questioned the necessity and effectiveness of conventionality control. Based on the enforcement of the IACtHR decisions on amnesty laws by national authorities of Argentina and Peru, for instance, the IACtHR did not need to introduce conventionality control into inter-American human rights jurisprudence. He has also claimed that conventionality control could harm the authority of the IACtHR in the region. Ultimately, this top-down approach could be more susceptible to a backlash against the international court's legal authority.[449]

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[443]On his interpretation of this issue, see: Eduardo Ferrer Mac-Gregor, "What do We Mean When We Talk About Judicial Dialogue?: Reflections of a Judge of the Inter-American Court of Human Rights," Harvard Human Rights Journal 30, (2017), 89-127.

[444]Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, Ximena Soley, "Ius Constitutionale Commune en América Latina. A Regional Approach to Transformative Constitutionalism," in *Transformative Constitutionalism in Latin America*, eds. Armin von Bodgandy et al., (Oxford: Oxford University Press, 2017), 3-23, 5.

[445]Ibid. 6.

[446]Jorge Contesse, "The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine," The International Journal of Human Rights 22, no. 9, (2018), 1168-1191.

[447]"[T]he Inter-American Court's authority is – and should be – international, not constitutional. (…) the court has sought to establish itself as a superior, *constitutional* court, (…) but this has happened at the expense of its *international* legal authority" (emphasis on the original). Ibid, 1169.

[448]He has also pointed out that: "With doctrines like conventionality control, the Inter-American Court construes regional human rights law as self-executing. The court usurps a constitutional decision from states, as incorporation is fundamentally a municipal, not an international, decision." Ibid, 1178.

[449]"The court needs the states' support; it can derive its legitimacy and exercise its authority only in so far as the states, as primary members of the international community, confer this legitimacy and authority upon it. Particularly in the context of more established democracies, the Inter-Ameircan Court faces significant, direct

The inter-American practice of strong judicial review was also described as one example of the IACtHR "antidemocratic and illiberal tendencies."[450] For Ezequiel Malarino, the IACtHR has practiced international judicial activism, which has gradually converted the ACHR into a different text than the one the IAS member states initially signed. For him, the IACtHR "rewrote the ACHR in terms of both individual rights and issues concerning the court's competence and functions"[451] by, for instance, creating new rules, broadening its competence to rule on facts that occurred prior to the ratification of the ACHR and extending the effects of decisions well beyond the immediate cases. For Malarino, the practice of conventionality control just confirms these antidemocratic and illiberal features of inter-American human rights jurisprudence.[452]

Roberto Gargarella was also critical of the IACtHR decision to strike down the Uruguayan amnesty law in *Gelman v. Uruguay*. As this study will later explain, this decision involved the most salient democratic challenge to the judicial review of an amnesty statute, because the Uruguayan amnesty law had been twice confirmed in referenda. For Gargarella, after these demonstrations of popular support, the Uruguayan amnesty law was "*democratically legitimate to a significant degree*" (emphasis on the original).[453] He has referred to a "problem of democratic pedigree" of the IACtHR decision, namely the fact that the IACtHR "in fewer than ten lines, and basically without offering any argument (...) overruled a decision of the Uruguayan Congress that had been ratified by the popular opinion of more than 50% of the population expressed through clean and direct means."[454]

There have also been critical references to the practice of transformative constitutionalism at the domestic and inter-American levels. Regarding the domestic level, Helena Alviar Garcia has claimed that socioeconomic rights litigation has not evolved as some

challenges from member states. The best response to these challenges is not combative, top-down stance, but collaboration founded in bottom-up legitimacy." Ibid, 1184.

[450]Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," International Criminal Law Review 12, (2012), 665-695.

[451]Ibid, 666.

[452]He has claimed that conventionality control practice illustrates the "punitivism" within inter-American human rights jurisprudence. Ibid, 681.

[453]"The legitimacy of the norm in question is notably reinforced, however, by having been twice approved by popular votes, which are understood to be the highest expression of popular sovereignty." Roberto Gargarella, "The Constitutionalization of International Law in Latin America. Democracy and Rights in Gelman v. Uruguay," American Journal of International Law Unbound 109, (2015), 115-119, 117.

[454]Ibid.

have hoped it would and, most importantly, that it did not "succeed in challenging the basic market structures and economic conditions that lead to the unequal distribution of social resources"[455] in most Latin American countries. Referring to the high level of socioeconomic rights litigation in Colombia, she has argued that "at the end of the day the overall power structure and unequal distribution remain largely intact."[456] Michaela Hailbronner has called attention to the risks and challenges inherent in rights adjudication according to transformative constitutionalism in countries of the Global South.[457] For her, "if 'doing good' is courts' main source of authority," there are the risks of arbitrariness, inconsistency and unfairness of judicial decisions. Moreover, "founding judicial authority on good outcomes"[458] leads to direct competition between judges and politicians, whereby courts may involve themselves in risky political gambles in order to gain or maintain their judicial authority over public policies.

Regarding the inter-American level of human rights enforcement, the critical references to transformative constitutionalism were also present in the debate among IACtHR judges about the judicially enforceable character of socioeconomic rights. In his concurring opinion to *Lagos del Campo*, Judge Humberto Sierra Porto mentioned the strong position of some judges within the IACtHR regarding the direct enforcement of Art. 26 ACHR.[459] He then demonstrated his opposition to transformative constitutionalism, claiming that "no transformative law can be made contrary to existing law."[460] He also claimed that decisions like *Lagos del Campo* "propose a vision, a project of integration and transformation guided solely by the organs of the IAS," and that this moves the IACtHR away from its main function, "which is to administer justice, guaranteeing the protection of human rights under the strict observance of its competence."[461]

Based on the discussion presented above, there are different interpretations of the advantages and disadvantages of the practice of strong inter-American judicial review of domestic laws. Some scholars have argued that strong judicial review could contribute to more

[455]Helena Alviar Garcia, "Distribution of Resources led by Courts: a Few Words of Caution," in *Social and Economic Rights in Theory and Practice*, eds. Helena Alviar Garcia, Karl Klare and Lucy A. Williams, (London, New York: Routledge, 2015), 67-84, 67.
[456]Ibid, 68.
[457]Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South," The American Journal of Comparative Law 65, (2017), 527-565.
[458]Ibid, 556-557.
[459]IACtHR (Concurring Opinion Judge Humberto Antonio Sierra Porto) August 31, 2017, Case of *Lagos del Campo v. Peru*, §45
[460]Ibid, §48.
[461]Ibid.

integration through human rights law and even lead to the emergence of a Latin American *ius constitutionale commune*. This stronger integration could improve human rights enforcement and also be to the benefit of the other major fields of global constitutionalism in Latin America, i.e., democracy and the rule of law. Other scholars have claimed that the specific forms of judicial review are illegitimate and ineffective within inter-American human rights jurisprudence. Conventionality control, for instance, is said to be an illegitimate intrusion of the IACtHR into the constitutional powers of national authorities. The direct enforcement of socioeconomic rights is claimed to be an illegitimate interpretation of inter-American documents referring to the protection of these rights at the regional level.

Due to the increasing critique of the practice of strong inter-American judicial review, some legal scholars have tried to offer a better approach to its legitimacy and effectiveness issues. One common feature of these approaches is their references to the subsidiary principle as it is applicable to international human rights enforcement. The principle of subsidiarity has been offered as a compelling argument for the IACtHR to adopt weaker forms of international judicial review. The concluding section of this chapter will address how legal authorities and scholars have referred to a higher level of subsidiarity as a compelling argument for weakening the practice of inter-American judicial review and how this discussion leads us to the concept of the national margin of appreciation within European human rights jurisprudence.

4.7. Interim conclusion: Strong inter-American judicial review and the principle of subsidiarity

The subsidiary character of the IAS to national systems is established by Art. 46 ACHR. More specifically, Art. 46 (a) ACHR establishes that the admission of a petition by the IACHR depends on the fact that "the remedies under domestic law *have been pursued and exhausted* in accordance with generally recognized principles of international law."[462] (my emphasis). In line with this ACHR provision, the question arises of what the exhaustion of domestic remedies exactly means. Art. 46 ACHR has been traditionally invoked by respondent states to contest the admissibility of petitions and requests.[463] Laurence Burgorgue-Larsen has explained that

[462]ACHR, art. 46 (a).
[463]Laurence Burgorgue-Larsen, "Exhaustion of Domestic Remedies," in *The Inter-American Court of Human Rights. Case Law and Commentary*, eds. Laurence Burgorgue-Larsen, Amaya Úbeda de Torres (Oxford: Oxford University Press, 2011), 129-145, 132.

the IAS's institutions "have interpreted the requirement of exhaustion of domestic remedies in a way that is flexible and favorable to the victims."[464] The IACtHR has reviewed whether the domestic measures were adequate and effective remedies for the human rights violations in a specific case.

In fact, legal scholars have more than once expressly mentioned the subsidiary character of inter-American human rights protection as an argument for the adoption of weaker forms of inter-American judicial review. Paolo Carozza, for instance, has emphasized that subsidiarity is a structural principle of international human rights law.[465] Other legal scholars have lamented the lack of attention to the subsidiary principle by the IACtHR. Gerald Neumann, for instance, has claimed that the IACtHR has insufficiently considered the consent of the IAS member states in its evolutive jurisprudence.[466] Jorge Contesse has also claimed that the IACtHR could adopt a different approach towards Latin American states, which currently include a greater number of established democracies than in the region's authoritarian past.[467] These approaches share a common sense that a greater attention to the principle of subsidiarity could resolve the legitimacy and effectiveness issues inherent in the practice of strong inter-American judicial review, given that this principle could lead to the adoption of weaker forms of international judicial review by the IACtHR.

Yet, a salient question related to these scholars' proposals is: Has the practice of strong inter-American judicial review violated the principle of subsidiarity regarding international human rights protection? According to the most emphatic defenders of strong inter-American judicial review, it has not. The relation between the subsidiarity principle and conventionality control has been addressed, for instance, by Judge Eduardo Ferrer Mac-Gregor in his concurrent opinion on *Cabrera Garcia and Montiel Flores v. Mexico*.[468] For him, conventionality control has not made the IACtHR into a court of appeal or a "court of 4th instance" within the IAS.[469] He argued that the subsidiary character of conventionality control relies on the primary

[464]She has added: "This is totally understandable on a continent where democracies are young and still fragile, having appeared in the mid-1980s, and where there is still risk that the States will use and abuse this requirement", Ibid, 138.
[465]Paolo Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," American Journal of International Law 97, (2003), 38-79.
[466]Gerald Neumann, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights," European Journal of International Law 19, no. 1, (2008), 101–123.
[467]Jorge Contesse, "The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights," International Journal of Constitutional Law 15, no. 2, (2017), 414–435.
[468]IACtHR, (Individual Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor), Case of *Cabrera Garcia and Montiel Flores v. Mexico*.
[469]Ibid, §11.

authority of the IAS member states to offer solutions for human rights violations; only after this exhaustion of domestic remedies may the same violations be reported to the inter-American institutions.

The relationship between conventionality control and the subsidiarity principle has also been addressed by the IACtHR within at least two judgements. In *Santo Domingo Massacre v. Colombia*,[470] the court emphasized the subsidiary and complementary character of inter-American human rights jurisprudence to national legal systems. For the IACtHR, it is only possible to hold states accountable under the ACHR after national authorities "had the opportunity to declare the violation and to repair the damage caused by its own means."[471] The IACtHR claimed that the principle of subsidiarity (or complementarity) "crosscuts" the IAS in a way that the system of protection established by the ACHR does not replace the work of national authorities but complements it.[472] Moreover, the IACtHR affirmed that the state represents "the main guarantor of the human rights of the individual, so that, if an act that violates the said rights occurs, it is the state itself that has the obligation to decide the matter at the domestic level (...) before having to respond before international instances."[473] The IACtHR further established that conventionality control is in accordance with the complementary nature of inter-American human rights enforcement given that it represents "a dynamic and complementary control of the conventional obligations of States to respect and guarantee human rights" within the IAS.[474] The IACtHR claimed that domestic authorities are "primarily obligated" to practice conventionality control, while the inter-American authorities are only "complementarily" obligated to do so. For the court, this form of decision-making and protection of human rights ensure that the national and international levels can be both shaped and adapted to each other.[475] Since *Santo Domingo Massacre*, the IACtHR has reiterated this position in other cases like *Andrade Salmón v. Bolivia*.[476]

In his individual concurrent opinion on the order of monitory compliance in *Gelman v. Uruguay*,[477] Judge Ferrer Mac-Gregor argued that lawyers could distinguish between *primary*

[470]IACtHR, (Judgement) August 19, 2013, Case of *Santo Domingo Massacre v. Colombia*.
[471]Ibid, §142.
[472]Ibid.
[473]Ibid.
[474]Ibid, §143.
[475]Ibid.
[476]IACtHR, (Judgement) December 1, 2016, Case of *Andrade Salmón v. Bolivia*, §§ 93-95.
[477]IACtHR (Concurring Opinion Judge Eduardo Ferrer Mac-Gregor on the Compliance with Judgement) March 20, 2013, Case of *Gelman v. Uruguay*.

and *secondary* conventionality control based on the subsidiarity principle. For him, primary conventionality control is exercised by national authorities and, if they fail at this task, secondary control may be exercised by the IACHR and, ultimately, by the IACtHR. Moreover, he distinguished between the *res judicata* and the *res interpretata* authority of the IACtHR decisions. [478] He defined the *erga omnes* effects of inter-American jurisprudence within the IAS as relating to their *res interpretata* authority. This *res interpretata* authority refers to the duty of domestic authorities within the IAS to enforce the interpretation of inter-American human rights law held by the IACtHR as general elements of the regional *corpus iuris*. For Judge Ferrer Mac-Gregor, this authority is relative based on Art. 29 ACHR, which establishes that the ACHR provisions deserve privilege only if they are the most favorable for the individual (*pro homine* or *pro persona* principle). By contrast, the *res judicata* authority refers to the absolute *inter partes* authority of a decision laid down by the IACtHR towards an IAS member state. This *res judicata* authority is normatively binding only on the respondent state in a specific case.

Despite these arguments offered by the IACtHR and by legal scholars, the violation of the principle of subsidiarity has become one of the most salient counter-arguments to the practice of strong inter-American judicial review. Due to the relevance of this argument, one pertinent question is whether the IACtHR could adopt a weaker form of international judicial review based on the subsidiary character of inter-American human rights protection. Does any form of weak international judicial review have the capacity to introduce a higher level of subsidiarity to inter-American human rights jurisprudence? The answer to this question relates to which concrete form weak inter-American judicial review should adopt within the IAS. Pablo González-Dominguez has offered one important contribution to this debate when he tried to reconstruct the practice of conventionality control in light of the subsidiarity principle. [479]

González-Dominguez claimed that the existence of conventionality control is legitimate based on the circumstances of its emergence, i.e., Latin America's historical struggle against the practice of gross human rights violations. Despite being legitimate, he argued that the IACtHR should change the practice of conventionality control by paying greater attention to the principle of subsidiarity. For him, the principle of subsidiarity can be used as a basis for distinguishing between conventionality control as an international obligation, namely the guarantee of non-repetition of human rights violations, and as a principle, which allows more

[478] Ibid, §22-79.
[479] Pablo González-Dominguez, The Doctrine of Conventionality Control. Between Uniformity and Legal Pluralism in the Inter-American Human Rights System, (Cambridge et al.: Intersentia, 2018).

flexibility to national authorities to enforce inter-American human rights jurisprudence.[480] He based this distinction on an interpretation of Art. 2 ACHR, according to which a high but not absolute degree of freedom should be granted to states to decide how to enforce inter-American human rights law within domestic law.[481]

As an international obligation, conventionality control represents a guarantee of non-repetition of gross human rights violations. For him, strong inter-American review is legitimate "when states systematically fail to comply with practices that are manifestly anti-conventional, and where the [IACtHR] finds that States are incapable or unwilling to modify laws and practices that are the causes of human rights violations."[482] In contrast, conventionality control could also figure as a general doctrine of compliance with inter-American human rights law. In this sense, González-Dominguez argued that it should be taken as a principle.[483] He further explained that, as a principle, there are different degrees of the practice of conventionality control in different states. These different degrees are based on i) the competences of domestic authorities, ii) the constitutional hierarchy of the inter-American *corpus iuris* within domestic law and iii) the open character of international human rights law, which allows different forms of specification of these rights.[484]

González-Dominguez's approach is interesting with respect to how the IACtHR could weaken the practice of inter-American judicial review based on the principle of subsidiarity. Similar to the theory of mixed-form inter-American judicial review that this study will propose, his theory of conventionality control also encompasses the same idea of mixing strong judicial review (conventionality control as an international obligation) with a weaker form (conventionality control as a principle). However, the most problematic issues in his theory is arguably that he does not pay great attention to current challenges to human rights enforcement in Latin America. In light of these current challenges, the practice of strong inter-American judicial review could be limited to address flagrant violations of civil and political rights within the IAS, while weak inter-American review could be limited to cases involving socioeconomic

[480]Ibid, 181.
[481]Ibid, 184.
[482]Ibid, 180.
[483]He has described the two different circumstances of the practice of conventionality control. As an international obligation, conventionality control is connected to the existence of a domestic anti-conventional interpretation or an anti-conventional law in a concrete case; as a principle, conventionality control is seen as a doctrine of general applicability of regional human rights law, according to which the IACtHR adds new normative elements to the ACHR. See: Ibid,181.
[484]Ibid, 214-232.

rights. Yet, before describing this theory, it is worth addressing in the following chapter the most prominently proposed way of adding subsidiary into inter-American human rights jurisprudence, i.e., the concept of the national margin of appreciation within ECtHR jurisprudence. As the next chapter will argue, the comparison between inter-American and European human rights jurisprudence can strengthen the argument for the necessity of a context-based theory of international judicial review in Latin America.

PART III. THE LEGAL SCHOLAR IN ACTION

V. Borrowing the European Margin of Appreciation?

Some legal scholars have proposed affording national authorities a greater margin of appreciation as a viable approach to international human rights adjudication within the IAS. The concept of the national margin of appreciation is well-known within European human rights jurisprudence. References to the usefulness of the margin of appreciation in Latin America have come to prominence due to the IACtHR's increasing authority and, especially, since the introduction of strong inter-American judicial review (more specifically, conventionality control) into inter-American jurisprudence. Due to this growing relevance, this chapter will now address the concept of the margin of appreciation and its arguable usefulness for the IACtHR. First, this chapter will mention some of these references to the usefulness of the margin of appreciation for inter-American human rights jurisprudence. It will then analyze the absence of the margin of appreciation from inter-American jurisprudence by comparing some IACtHR decisions with the ones made by the ECtHR in cases that involved similar facts. Then, the chapter will address the scholarly debate on the margin of appreciation in order to find patterns of its practice within extensive European case law involving this concept. Finally, the present chapter will explain how the concept of the national margin of appreciation can be reconciled with the task of developing a context-based theory of inter-American judicial review in Latin America.

5.1. The margin of appreciation as an alternative form of inter-American judicial review?

In their general and more specific features, the ECtHR practice of granting national authorities a wider margin of appreciation is opposed to the inter-American practice of conventionality control. While the margin of appreciation privilege deference to state authorities within the multilevel system of human rights protection, the practice of conventionality control emphasizes the binding character of inter-American human rights legislation and jurisprudence. Generally, the IACtHR has been reluctant to grant a higher level of scrutiny to domestic state authorities within the IAS. The first reason for this reluctance seems to be the historical development of the IAS, which was followed by major challenges to

the proper enforcement of civil rights and political liberties brought about by authoritarian domestic governments in the region. Related to this first reason, the IACtHR has also been concerned with the effectiveness of its interpretations of inter-American human rights law. It seems that the IACtHR does not entirely trust domestic authorities regarding human rights protection due to traditional skepticism and a concern with the effectiveness of its decisions, given the fact that the court does not have its own enforcement mechanisms.[485]

Despite Latin America's troubled past and its consequences for the particular development of inter-American human rights jurisprudence, some scholars have argued that the IACtHR should now embrace the concept of the margin of appreciation in its relationship with national authorities. Andreas Føllesdal, for instance, has claimed that the margin of appreciation is "also compatible with the IAS," whereby the IACtHR must "adjudicate states with fragile democratic and rule of law traditions – *skeptics notwithstanding*" (my emphasis).[486] For him, the margin of appreciation could ensure that the IACtHR judges become more deferential to the domestic level when seeking to resolve human rights violations. Dominic McGoldrick has also claimed that the IACtHR should afford member states a margin of appreciation based on the fact that many Latin American countries are now broadly democratic.[487] For him, "democratic and political legitimacy should push the IACtHR towards respecting the decisions of, and the balances struck by, national legislatures, executives and courts, in the same way that the ECtHR does."[488]

Not only legal scholars have underscored the usefulness of the margin of appreciation for the IACtHR. Some IACtHR judges have also referred to it when seeking to resolve cases and even regretted the absence of domestic discretion within IACtHR case law. In some cases, these IACtHR judges have even contested this absence. Although this contestation has been more present in the literature and it has been of marginal importance in the IACtHR decisions

[485]On this issue, see: Başak Çali, "Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders," International Journal of Constitutional Law 16, no. 1, (2018), 214-234.
[486]Andreas Føllesdal, "Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights," International Journal of Constitutional Law 15, no. 2, (2017), 359–371, 360.
[487]"The 2014 Freedom House Survey classified 68 per cent of the Americas as free and 28% as partly free, making it the freest region outside of Europe. The ACHR system is thus maturing within the context of longer periods of democratic rule. Some diversity in the range of national decisions in states' interpretation of rights, each carrying degrees of democratic legitimacy, would be a normal consequence. To not afford a degree of deference via the MoA [margin of appreciation] to those decisions because of the undemocratic nature of previous regimes seems indefensible." Dominic McGoldrick, "Affording States a Margin of Appreciation: Comparing the European Court of Human Rights and the Inter-American Court of Human Rights," in *Towards Convergence in International Human Rights Law*, eds. Carla Buckley, Alice Donald, Philip Leach, (Leiden, Boston: Brill Nijhoff, 2017), 325-365, 344-345.
[488]Ibid, 353.

to date, it seems worth addressing how some judges referred to the national margin of appreciation as a possible way to remedy human rights violations within the IAS. It is worth focusing on references to national authorities' discretion within cases that involved the practice of strong inter-American judicial review, i.e., conventionality control and the direct enforcement of socioeconomic rights. In view of this, at least two examples are worth mentioning.

The first example is the individual dissenting opinion of Judge Alberto Pérez Pérez on *Atala Riffo*.[489] For him, the evolving interpretation of the ACHR as a living instrument should be based on "the understanding that, in order to make progress (…), it is necessary to reach a consensus, or common ground or a convergence of standards among the States Party."[490] He claimed that this regional consensus existed with regard to discrimination based on sexual orientation in the case but argued that "the same cannot be said with respect to the evolution of the notion of the family and its status as the foundation or basic and natural element of society."[491] In that sense, the IACtHR did not need to establish a violation of Art. 17 (1) ACHR ("Right to family"), because this was "one of the areas in which it is most essential to allow a *national margin of appreciation*" to the state authorities (my emphasis).[492]

The second example of an individual opinion that contested the lack of inter-American practice of the margin of appreciation comes from the dissenting opinion of Judge Eduardo Vio Grossi in *Lagos del Campo*.[493] As this study has already mentioned, this case involved the practice of strong judicial review by means of the direct enforcement of the right to work (Art. 6 PSS, Art. 26 ACHR). For Judge Vio Grossi, the majoritarian decision in *Lagos del Campo* was wrong because it ignored the fact that "within the scope of national law," there is a realm of exclusive state authority "also *called the margin of appreciation*, which shows that not everything is regulated by international law."[494] He also argued that according to the ACHR, this realm of exclusive state authority apply to the enforcement of socioeconomic rights.

Is it appropriate to advocate for the practice of the national margin of appreciation in order to introduce a counterweight to the practice of strong inter-American judicial review?

[489]IACtHR, (Concurring Opinion Judge Alberto Pérez Pérez) February 24, 2012, Case of *Atala Riffo v. Chile*.
[490]Ibid, §20.
[491]Ibid, §21.
[492]Ibid., §23.
[493]IACtHR, (Concurring Opinion Judge Eduardo Vio Grossi) August 31, 2017, Case of *Lagos del Campo v. Peru*,
[494]Ibid, "Conclusion."

Could the margin of appreciation be used in order to weaken the international judicial activism of the IACtHR? This chapter will try to answer these questions about the usefulness of the concept of the domestic margin of appreciation first by comparing both inter-American and European human rights jurisprudence and second by analyzing the scholarly debate about the ECtHR's jurisprudential approach to this concept.

As mentioned, an overall analysis of inter-American jurisprudence shows that the IACtHR has not adopted the margin of appreciation as a general principle of deference to national authorities.[495] Gonzalo Candia has guessed that the reason behind this overall rejection is the "desire of many activists and scholars to transform the IACtHR into the new constitutional court of the Americas, with absolute powers to make uniform the interpretation and application of the Inter-American convention throughout the continent."[496] For him, "this necessarily prevents any significant use of the margin of appreciation doctrine" in Latin America.[497] Despite his guess about the second intentions of some activists and scholars, it is necessary to undertake a more accurate analysis of the cases in which the IACtHR could have granted state authorities a wider margin of appreciation of the immediate human rights violations. Some cases might help us understand why the IACtHR has opted for strong inter-American judicial review and not for deference to domestic state authorities. Notwithstanding this relevance of comparative scholarship, scholars should be careful when comparing inter-American and European human rights jurisprudence.

A particular case group that it is often addressed as illustrative of the overall rejection of the margin of appreciation by the IACtHR is amnesty case law. However, a comparison between both regional systems based on amnesty case law is not appropriate. The amnesty cases usually involved gross human rights violations, such as extrajudicial executions, enforced disappearances, and torture. These violations of the ACHR allow, in fact, no margin of appreciation for national authorities. Once it was established that the state authorities were responsible for cases of torture or enforced disappearance, there was no scope for discussions

[495]On this general rejection of the margin of appreciation within inter-American human rights jurisprudence, see: Claudio Nash Rojas, "La Doctrina del Margen de Apreciación y su Nula Recepción en la Jurisprudencia de la Corte Interamericana de Derechos Humanos," Anuario Colombiano de Derecho Internacional 11, (2018), 71-100.
[496]Gonzalo Candia, "Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights," available at: SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406705.
[497]Ibid, 22. Dominic McGoldrick has mentioned the protection of the universality of human rights, anti-eurocentrism and the misunderstanding of the margin of appreciation as possible explanations for the non-use of the margin of appreciation by the IACtHR. See: McGoldrick, Affording States a Margin of Appreciation: Comparing the European Court of Human Rights and the Inter-American Court of Human Rights, 359-361.

on whether there should be any domestic margin of appreciation of the matter. Amnesty cases relating to gross human rights violations are, therefore, not best suited for a fair comparison between jurisprudence of both regional human rights courts.

Three different case groups will serve for the comparison between inter-American and European human rights jurisprudence with regard to the practice of deference to the domestic level: i) cases of state interference with the right to freedom of expression based on the concept of public morality, ii) cases involving the right to reproductive techniques like fertilization in vitro and its inherent morally-charged issues like the embryo's right to life, and, finally, iii) cases involving discrimination based on sexual orientation. These cases groups enable us legal scholars to fairly compare the Latin American with the European context with regard to deference to the domestic level. This comparison can be useful for legal scholars that seek alternatives to the practice of strong inter-American judicial review. The fair comparison between both regional systems can offer new horizons for the discussion of conventionality control and the direct enforcement of socioeconomic rights within the IAS.

5.2. International human rights jurisprudence and deference to national authorities

5.2.1. Comparing inter-American and European human rights jurisprudence: case studies

The following comparative analysis is certainly not exhaustive of extensive European case law relating to the different case groups mentioned below. Other studies have compared inter-American with ECtHR jurisprudence in greater detail and with regard to different issues like the differences in the institutional structure of the courts and the overall evolution of regional human rights jurisprudence.[498] The following sections will mention at least one specific inter-American case relating to each case group and will compare it to other similar European cases. Even if limited to a few cases, the following comparative analysis is able to illustrate how the ECtHR deferred to national authorities in cases in which the IACtHR opted for practicing strong inter-American judicial review.

[498]See, for instance: *Symposium: Comparing Regional Human Rights Regimes*, International Journal of Constitutional Law 16, no. 1, (2018), 128-253.

i) State interference with the right to freedom of expression based on offenses to public morality

A particular piece of regional case law that illustrates the differences regarding the forms of international judicial review between the ECtHR and the IACtHR involves the concept of public morality. While in Europe, public morality has influenced the ECtHR and prompted it to give state authorities a higher discretion based on the argument that they probably know better about the moral sensibilities of their own communities, in Latin America the IACtHR has constrained the action of national state authorities based on its own interpretation of similar offenses to public morality. *The Last temptation of Christ v. Chile*[499] is an illustrative case of the non-adoption of the margin of appreciation by the IACtHR based on offenses to public morality. This case concerned the rights to freedom of conscience and religion (Art. 12 ACHR) and to freedom of thought and expression (Art. 13 ACHR) regarding a judicial prohibition of the exhibition of a Martin Scorsese's film that depicted Jesus Christ in a struggle against various forms of *temptations*, such as fear, depression and lust. The film was first submitted to previous domestic censorship established by Art. 19 (12) of the Chilean constitution, which authorized it. Later, the Second Court of Santiago reviewed this administrative decision and prohibited the film. This decision was confirmed by the Chilean Supreme Court.[500]

Although the IACtHR did not establish a violation of Art. 12 ACHR, it established a violation of Art. 13, together with Arts. 1 (1) and 2 ACHR. For the IACtHR, the existence of film censorship in the Chilean constitution was not in accordance with the ACHR. The court considered that the ban on exhibiting the film constituted prior censorship in violation of Art. 13 ACHR, which only allowed prior censorship in cases of public entertainment in order to regulate film exhibition based on the protection of children and adolescents.[501] For the IACtHR, "by maintaining cinematographic censorship in the Chilean legal system," the state authorities were "failing to comply with the obligation to adapt its domestic law to the Convention in order

[499]IACtHR, (Judgement) February 5, 2001, Case of "*The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*.
[500]The Chilean Court ruled that: "In the film, the image of Christ is deformed and diminished, to the utmost. In this way, the problem is posed of whether it is possible, in the name of freedom of expression, to destroy the sincere beliefs of a great many people. (…) No one doubts that the greatness of a nation can be measured by the attention it gives to the values that allowed it to exist and grow. If these are neglected [or] abused, as the image of Christ is deformed and abused, the nation is endangered, because the values on which it is based are disregarded." See: Ibid, §78.
[501]Ibid, §§70-71.

to make effective the rights embodied in it."[502] In line with this, the IACtHR ordered that domestic authorities should amend the constitution in order to eliminate this form of prior censorship of films.[503] Due to this ordered measure, this judgement represents an example of strong inter-American judicial review of domestic law despite the fact that this case was decided even before the establishment of conventionality control within inter-American jurisprudence. The Chilean national congress complied with the IACtHR decision and amended the Chilean constitution. The national legislature established the right to freedom of artistic creation and eliminated censorship, which was substituted by a classification system. This classification system was designed to guide adults with regard to the contents of film productions and protect children and adolescents based on international treaties on the matter.[504]

The Last Temptation of Christ illustrates the IACtHR reluctance to admit that national authorities are in a better position to decide when a particular work of art offends the religious sentiments prevailing in a community. It is, in fact, a diametrical opposite decision to the one held in *Handsyde v. United Kingdom*,[505] whereby the ECtHR decided that national authorities are better able to rule over restrictions of the freedom of expression based on offenses to public morality. *Handsyde* has become the leading case for the concept of the national margin of appreciation in Europe.[506] It involved the notion of obscenity under Art. 10 ECHR regarding a schoolbook that were considered obscene by national authorities.[507] In this case, the state authorities confiscated the book alleging offenses to public morality, which justified the state interference with the right to freedom of expression according to the Art 10 (2) ECHR. This provision establishes that the exercise of the freedom of expression may be subject to "formalities, conditions, restrictions or penalties (…) prescribed by law and (…) necessary in a democratic society" based on "the protection of health or morals."[508]. In *Handyside*, the ECtHR held that the confiscation of the book was prescribed by domestic law and had "an aim that is legitimate" under Art. 10 (2) ECHR, "namely the protection of morals in a democratic

[502]Ibid, §88.
[503]Ibid, 4th operative paragraph.
[504]Scorsese's film was ultimately reclassified by the new classification council and included in the category over 18 years of age. See: IACtHR (Compliance with Judgement) November 28, 2003, §§19-20.
[505]ECtHR, (Judgement) December 7, 1976, Case of *Handyside v. The United Kingdom*.
[506]*Handyside v. UK* is comparable to what *Almonacid v. Chile* represents for the concept of conventionality control in Latin America.
[507]The book contained "chapters on the following subjects: Education, Learning, Teachers, Pupils and The System. The chapter on Pupils contained a twenty-six page section concerning 'Sex' which included the following sub-sections: Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or 'dirty old men', Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal diseases, Abortion, Legal and illegal abortion, Remember, Methods of abortion, Addresses for help and advice on sexual matters." Ibid, §20.
[508]ECHR, art. 10 (2).

society."[509] Moreover, due to the lack of a European moral consensus, national authorities should enjoy a margin of appreciation to evaluate if any interference with the right to freedom of expression is necessary due to offenses to public morality.[510]

The ECtHR has adopted *Handsyde* as a reference point for the decision of several other cases involving similar offenses of public morality within domestic law. The same deferential attitude to the national authorities was adopted, for instance, regarding the state authorities' confiscation of paintings that were considered obscene in *Müller and Others v. Switzerland*.[511] In this case, the ECtHR did not establish a violation of Art. 10 ECHR, which was alleged with regard to the confiscation of three paintings and the fine imposed on the applicants. The confiscation and fine were established because the paintings, which depicted fellatio, sodomy and sex with animals, had been shown in a public exhibition. The ECtHR considered the Swiss courts' decision reasonable, namely that painting depicting different manners of sexual relations, particularly with animals, could offend the ordinary sensibility of individuals in the community.[512] For the ECtHR, the state had a wide margin of appreciation to assess if there was a pressing social need to seize the paintings and fine the applicants.[513]

In *Otto-Preminger-Institut v. Austria*,[514] the ECtHR was asked to rule on the seizure of a satirical film involving the Christian religion by the Austrian public prosecutor, who alleged

[509]ECtHR, *Handyside v. UK*, § 45.
[510]According to the ECtHR: "...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. (...) Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force." Ibid, §48.
[511]ECtHR, (Judgement) May 24, 1988, Case of *Müller and Others v. Switzerland*.
[512]"In the instant case, it must be emphasized that - as the Swiss courts found both at the cantonal level at first instance and on appeal and at the federal level - the paintings in question depict in a crude manner sexual relations, particularly between men and animals. (…) The Court recognizes, as did the Swiss courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity' (see paragraph 18 above). In the circumstances, having regard to the margin of appreciation left to them under Article 10 §2 (art. 10-2), the Swiss courts were entitled to consider it 'necessary' for the protection of morals to impose a fine on the applicants for publishing obscene material." Ibid, §36.
[513]"[H]aving regard to their margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was 'necessary' for the protection of morals." Ibid, §43.
[514]ECtHR, (Judgement) September 20, 1994, Case of *Otto-Preminger-Institut v. Austria*.

a violation of Section 188 of the Austrian Penal Code.[515] The ECtHR pointed out that the provisions of the Austrian Penal Code were intended to prevent citizens from having their religious beliefs publicly insulted.[516] For the ECtHR, the seizure of the film did not represent a violation of the right to freedom of expression due to the lack of a regional European consensus on the significance of religion in society, which entitled Austrian authorities a broad margin of appreciation in evaluating the necessity of imposing restrictions to avoid any offense of religious beliefs.[517] In line with this, the ECtHR accepted the argument of a pressing social need to preserve religious peace, given that the film was to be screened in a city where Roman Catholicism is the majority religion. Based on that, it interpreted the seizure of the film as an act to ensure religious peace and prevent people from feeling attacked based on their religious beliefs. [518]

Likewise, in *Wingrove v. United Kingdom*,[519] the ECtHR did not establish a violation of Art. 10 ECHR due to the refusal of the British Board of Film Classification to certify a film produced by the applicant. For the British authority, the film violated the criminal law of blasphemy and could give rise to outrage at the unacceptable treatment of the sacred subject of Christ by depicting his crucified body as a participant in the erotic desires of St. Teresa. Here, again, the ECtHR found no violation of Art. 10 ECHR based on the legality and necessity of the interference with the right to freedom of expression according to state authorities' interpretation of the matter.[520]

It is worth mentioning that the ECtHR has not unconditionally deferred to states authorities' interpretation of the restriction to freedom of expression. Cases like *Giniewski v. France*[521] and *Unifaun Theatre Productions v. Malta*[522] demonstrate that the ECtHR might

[515]According to an informational bulletin distributed by the institute, in the film "[t]rivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated." Ibid, §10. The public prosecutor established criminal proceedings against the institute at the request of a Roman-Catholic diocese: Ibid, §11.
[516]Ibid, §48.
[517]"As in the case of 'morals' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (...) For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference." Ibid, §50.
[518]Ibid, §§51-57.
[519]ECtHR, (Judgement) November 25, 1996, Case of *Wingrove v. The United Kingdom*.
[520]A similar interpretation can be found in: ECtHR, (Judgement) July 10, 2003, Case of *Murphy v. Ireland.*
[521]ECtHR, (Judgement) January 31, 2006, Case of *Giniewski v. France*.
[522]ECtHR, (Judgement) May 15, 2018, Case of *Unifaun Theatre Productions Limited and Others v. Malta*.

adopt a strict review of state interference if it considers that the limitation of freedom of expression was not "prescribed by law", nor had it a "legitimate aim" or was it "necessary in a democratic society," according to Art. 10 (2) ECHR. However, the ECtHR has consistently deferred to national authorities when enforcing Art. 10 (2) ECHR. In its 2018 decision in *E.S v. Austria*,[523] the ECtHR deferred to national authorities' interference with the right to freedom of expression of an Austrian woman who held seminars about the Islam. In these seminars she, among other things, accused Muhammed of pedophilia and was criminally prosecuted and convicted according to Austrian law. In a unanimous judgement, the ECtHR found no violation of Art. 10 ECHR, because "the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion."[524] For the ECtHR, "the domestic authorities had a wide margin of appreciation in the instant case, as they were in a better position to evaluate which statements were likely to disturb the religious peace in their country."[525]

In conclusion, the IACtHR has not relied on the argument that national authorities are in a better position to know about the moral sensibilities of their communities as a reason to grant these authorities a wide margin of appreciation on the interference with the right to freedom of expression. The IACtHR has also not adopted the interpretation that, due to a lack of regional consensus regarding issues of public morality, state authorities should enjoy a wide margin of appreciation of these issues. In contrast to its European counterpart, the IACtHR did not establish, for instance, any violation of the right to freedom of religion in a case pertaining to a film that could offend the majority's religion in a particular community. Otherwise, in *The Last Temptation of Christ*, the IACtHR established that state interference with the exhibition of a film characterized a violation of Art. 13 ACHR and ordered the amendment of national law in order to bring it into accordance with inter-American human rights law.

[523]ECtHR, (Judgement) October 25, 2018, Case of *E.S v. Austria*.
[524]"In examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered 'necessary in a democratic society', the Court has frequently held that the Contracting States enjoy a certain margin of appreciation (…) The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion (…) Not only do they enjoy a wide margin of appreciation in that respect, they also have the positive obligation under Article 9 of the Convention of ensuring the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance." Ibid, §44.
[525]Ibid, §50.

ii) The right to medically-assisted reproductive techniques

The IACtHR non-deferential attitude can also be illustrated by cases involving other types of controversial moral issues. One of these cases was *Artavia Murillo v. Costa Rica*,[526] which involved the discussion of the prohibition of in vitro fertilization by national authorities based on the purported right to life of the embryo. The position that the IACtHR held in this case differs from decisions of the ECtHR in similar cases. The most salient difference is that the IACtHR has not drawn on the notion of a regional consensus in order to establish violations of the ACHR, even if an issue is controversial and could be interpreted in a different way by national authorities. In *Artavia Murillo*, the IACtHR ruled on the alleged human rights violations resulting from the presumed general prohibition of the practice of in vitro fertilization, which had been in effect in Costa Rica since 2000 due to a decision of the Constitutional Chamber of the Costa Rican Supreme Court of Justice. The IACHR argued that this absolute prohibition constituted arbitrary interference in the right to private life and the applicant's right to family. Moreover, it alleged that the prohibition violated the right to equality due to its disproportionate impact on women, inasmuch as the state had denied them access to a treatment that would have enabled them to overcome a genetic disadvantage with regard to the possibility of having biological children.[527]

The IACtHR acknowledged that Costa Rica was the only country that expressly prohibited in vitro fertilization in the region.[528] This reproductive technique was declared unconstitutional due to the judicial review of an executive decree that had previously regulated the reproductive technique in the country. One of the core arguments in favor of the unconstitutionality was that the technique would violate the right to life of the fertilized embryos. The Costa Rican court referred in its decision to the absolute protection of the embryo's right to life. For this national court, the right to life "must be protected for those who are born and also for the unborn" and, based on the current stage of the reproductive technique, in vitro fertilization "entails the conscious damage to human life."[529] In order to overrule this domestic decision, the IACtHR established its own position to the question of the embryo's

[526]IACtHR, (Judgement) November 28, 2012, Case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*.
[527]Ibid, §2.
[528]"Based on the expert opinions presented by the parties at the public hearing, it was established that Costa Rica is the only country in the region that prohibits and, therefore, does not practice IVF [in vitro fertilization]." Ibid, §254.
[529]Ibid, §256.

right to life.[530] Based on this interpretation, the IACtHR found no violation of the ACHR in the case and ordered that domestic authorities had to undertake the appropriate measures to ensure that "the prohibition of the practice of in vitro fertilization is annulled as rapidly as possible so that those who wish to use this assisted reproduction technique may do so without encountering any impediments."[531] Hence, the IACtHR ordered that in vitro fertilization should be made available within Costa Rica's infertility treatments and programs, with the supervision of qualified professionals and institutions.[532]

This decision reveals the authoritative approach of the IACtHR, which disregarded national authorities' position that embryos could have a right to life. Beyond the Costa Rican court's decision, the IACtHR also acknowledged the draft of a bill that was meant to regulate in vitro fertilization in the country. According to this draft, national authorities were supposed to protect human rights from the moment of fertilization, and in vitro fertilization could only be practiced if all eggs fertilized during treatment cycle were transferred to the woman who produced them. The bill, which was not approved, intended to absolutely prohibit the reduction or destruction of embryos based on the protection of their right to life.[533] Furthermore, the IACtHR did not make any reference to the lack of an established regional consensus with regard to the issue of the embryo's right to life. Several points in *Artavia Murillo* differ from decisions held by the ECtHR in similar cases. The following cases are illustrative of how the ECtHR has relied on concept of the national margin of appreciation to solve similar issues addressed within *Artavia Murillo*.

In *Vo v. France*,[534] the applicant alleged that her therapeutic abortion, which was caused by the chirurgical rupture of her amniotic sack, should be considered manslaughter based on her unborn child's right to life (Art. 2 ECHR).[535] The ECtHR considered that, due to a lack of

[530]"The Court has used different methods of interpretation that have led to similar results according to which the embryo cannot be understood to be a person for the purposes of Article 4 (1) of the American Convention. In addition, after analyzing the available scientific data, the Court has concluded that 'conception' in the sense of Article 4 (1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention would not be applicable. Moreover, it can be concluded from the words 'in general' that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails the understanding that exceptions to the general rule are admissible." Ibid, §264.
[531]Ibid, §336.
[532]Ibid, §334-338.
[533]Ibid, §84.
[534]ECtHR, (Judgement) July 8, 2004, Case of *Vo v. France.*
[535]This was the result of an unfortunate misunderstanding. Another patient with a similar family name was at the same time at the hospital and was due to have a contraceptive coil removed. The doctor consulted her medical file and, noting that she could not understand and speak French very well, pierced the amniotic sac of the applicant

European consensus on the question of the right to life of the fetus, Art. 2 ECHR could not be applied to the case based on the existence of domestic legislation and state authorities' interpretation that went contrary to the applicant's claim.[536] The court further considered that it was "neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person" in terms of Art. 2 ECHR.[537] Based on that, the ECtHR found no violation of this ECHR provision.[538]

In *Evans v. United Kingdom*,[539] the ECtHR was asked to rule on the applicant's claim of a violation of Arts. 2, 8 and 14 ECHR due to the fact that domestic law permitted her former partner to withdraw his consent to the storage and use by her of embryos created jointly by them. According to the applicant, the provisions of domestic law that required the embryos to be destroyed violated the right to life under the ECHR and her right to have a child genetically related to her. In this case, again, in two specific points the ECtHR decision differed from the IACtHR judgement in *Artavia Murillo*. First, the ECtHR established that the specification of when the right to life began came within the state's margin of appreciation of this matter, which, in the case, led to the decision that the embryos did not have a right to life.[540] Second, the ECtHR dismissed the alleged violations of Arts. 8 and 14 ECHR given the lack of a European consensus on the matter.[541]

In *S.H and others v. Austria*,[542] the ECtHR ruled on the Austrian general prohibition of the use of sperm for in vitro fertilization and ova donation, which was contested by two Austrian couples wishing to conceive a child through this assisted reproductive technique.[543] The ECtHR acknowledged that, although there was a clear trend across Europe in favor of in vitro

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without realizing that this was a case of mistaken identity. This procedure eventually caused the termination of the applicant's pregnancy. Ibid, §§9-12. Based on these facts, "[t|he applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached Article 2 of the Convention." Ibid, §46.

[536]Ibid, §§80-85; "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere." Ibid, §82. "At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus." Ibid, §84.

[537]Ibid, §85.

[538]Ibid, §95.

[539]ECtHR, (Judgement) April 10, 2007, Case of *Evans v. the United Kingdom*.

[540]"[I]n the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant's case, an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2. There had not, accordingly, been a violation of that provision." Ibid, §54.

[541]Ibid, §§92, 96.

[542]ECtHR, (Judgement) November 3, 2011, Case of *S.H. and Others v. Austria.*

[543]The applicants alleged that this prohibition within domestic law violated Art. 8 ECHR (Right to Private and Family Life). Ibid, §49.

fertilization, the emerging European consensus was still developing and was not based on settled legal principles.[544] The ECtHR also recognized that Austrian legislators seriously discussed the consequences of allowing sperm and ova donation. For the ECtHR, the national legislature carefully approached a controversial issue that raises complex ethical questions. Moreover, the alleged violation of Art. 8 ECHR was dismissed based on the fact that Austrian authorities did not prohibit individuals from going abroad when seeking infertility treatments that were unavailable in the country.[545]

Just to mention a last case, in *Parrillo v. Italy*,[546] the ECtHR ruled on the alleged violations of the ECHR due to the ban under Italian law of the applicant's donation of her own in vitro fertilized embryos for scientific research. The ECtHR ruled that the right to donate embryos to scientific research was not "one of the core rights attracting the protection of Art. 8 ECHR,"[547] and that, consequently, the state should be afforded a wide margin of appreciation of this matter.[548] Moreover, Italian authorities should be granted a wide margin of appreciation due to the lack of a European consensus on the matter.[549] The court further pointed out that the drafting process of the Italian statute involved an intense discussion of the matter and that the national legislature had taken into account the state's interest in protecting both the embryo's and the individual's right to self-determination.[550] In line with this, the ECtHR concluded that the ban was in accordance with the ECHR, dismissing the alleged violation of Art. 8. ECHR.[551]

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[544]"The Court would conclude that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilization, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State." Ibid, §96.

[545]"The fact that the Austrian legislature, when enacting the Artificial Procreation Act which enshrined the decision not to allow the donation of sperm or ova for *in vitro* fertilization, did not at the same time prohibit sperm donation for *in vivo* fertilization – a technique which had been tolerated for a considerable period beforehand and had become accepted by society – is a matter that is of significance in the balancing of the respective interests and cannot be considered solely in the context of the efficient policing of the prohibitions. It shows rather the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field. In this connection, the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents." Ibid, §114.

[546]ECtHR, (Judgement) August 27, 2015, Case of *Parrillo v. Italy*.

[547]Ibid, §174.

[548]Ibid, §175.

[549]Ibid, §176.

[550]"The Court therefore observes that, during the drafting process of the Law in question the legislature had already taken account of the different interests at stake, particularly the State's interest in protecting the embryo and that of the persons concerned in exercising their right to individual self-determination in the form of donating their embryos to research." Ibid, §188.

[551]Ibid, §198.

In conclusion, the IACtHR has not relied on regional consensus in order to establish violations of the ACHR, even if a specific case involved controversial issues like the question of the embryo's right to life. The IACtHR has not shown the same level of consideration of national authorities' position on morally-controversial matters as the ECtHR has done. The IACtHR opted to enforce its own position and has expected that national authorities comply with its interpretations based on their obligation to abide by inter-American human rights jurisprudence according to the ACHR. If the IACtHR acknowledges any controversial issue that lacks consensus among inter-American states, it will likely take a proactive attitude and fill it with its own interpretations, which are based on the evolutive character of inter-American human rights jurisprudence.

iii) Discrimination based on gender and sexual orientation

Another interesting piece of case law that enables a comparison between both regional courts' jurisprudence is related to discrimination based on sexual orientation. Generally, the IACtHR and the ECtHR have established violations of their correspondent human rights conventions based on this type of discrimination. The difference lies in the fact that the ECtHR has allowed national authorities a higher margin of *manouevre* in some cases due to the lack of a European consensus on specific issues within European case law. In the opposite direction, the IACtHR established a violation of the ACHR in the first case involving this type of discrimination. Most importantly, the IACtHR related the enforcement of inter-American human rights law against discrimination based on sexual orientation to the practice of conventionality control, which gives rise to the practice of strong inter-American judicial review.

In *Atala Riffo v. Chile*,[552] the IACtHR ruled on Chile's international responsibility for discriminatory treatment and arbitrary interference in the private and family life of Ms. Atala Riffo who, due to her sexual orientation, lost custody of her three daughters. Ms. Atala married her husband, but years later they decided to end their marriage, after which she started to share the same house with her same-sex partner, 3 daughters and her eldest son. The children's father filled a custody suit, which argued, among other things, that Ms. Atala was putting the physical and emotional development of the girls at risk and that she was not able to take care of them

[552]IACtHR, (Judgement) February 24, 2012, Case of *Atala Riffo and Daughters v. Chile*.

based on her "new sexual lifestyle."[553] A juvenile court granted provisional custody of the girls to the father. This decision was later confirmed by the Chilean Supreme Court, which granted permanent custody to the father. According to the Chilean Supreme Court, Ms. Atala put her own interests before those of her daughters when she decided to live with a same-sex partner, which also caused confusion on the part of the girls about her mother's sexuality; the confusion was also due to the absence of a male figure at home, which could harm the children's development. This judgement also established that the girls were in a situation of risk due to their vulnerable position in a unique family environment, which significantly differed from that of their school companions and acquaintances in the neighborhood; this fact could expose the children to ostracism and discrimination, affecting their personal development.[554]

Atala Riffo was the first case in which the IACtHR established sexual orientation and gender identity as categories protected by the ACHR.[555] In its decision, the IACtHR contested the argument offered by the respondent state of the lack of a regional consensus on discrimination based on sexual orientation. When addressing this argument, the IACtHR affirmed the evolutive character of inter-American jurisprudence regarding the rights of discriminated minorities. For the IACtHR, "the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered."[556] Based on that, the IACtHR established that the Chilean courts failed to comply with the requirement of a "strict scrutiny test" and that "speculation, assumptions, stereotypes or generalized considerations regarding parent's personal characteristics or cultural preferences regarding family's traditional concepts are not admissible."[557]

The IACtHR acknowledged that it may be true that "certain societies can be intolerant based on race, gender, nationality or sexual orientation," but states cannot use this fact as a "justification to perpetuate discriminatory treatments."[558] The court emphasized that regional human rights jurisprudence must have a transformative purpose and promote structural changes

[553]Moreover, in the custody lawsuit, he argued that treating same-sex partners as normal could distort the meaning of a human couple, man and woman, and therefore, it could alter the "natural meaning of the family." See: Ibid, §31.
[554]Ibid, §§56,57.
[555]Ibid, §91.
[556]Ibid, §92.
[557]Ibid, §109.
[558]Ibid, §119.

that are able to dismantle stereotypes and practices that perpetuate discrimination against LGBT people.[559] Moreover, the IACtHR considered that the children's best interest cannot be used to justify discrimination against parents based on their sexuality.[560] In line with this, the IACtHR ruled that sexuality is an essential component of a person's identity and that it is not reasonable to require that someone puts his or her life and family project on hold because of it.[561]

After *Atalla Riffo*, the IACtHR established violations of the ACHR due to discrimination based on sexual orientation in 2 other cases.[562] In *Duque v. Colombia*,[563] the IACtHR found that Colombia had violated the ACHR for not providing equal access to public benefits to a gay man after the death of his partner. His right to a pension was refused within national law due to the fact that domestic laws had not recognized same-sex couples as eligible for this benefit in the past. However, when the IACtHR issued its decision, domestic laws on this matter had already been amended; these domestic laws guaranteed the right to the disputed benefit. Based on this fact, the IACtHR did not find any violation of Art. 2 ACHR.[564] In *Flor Fleire v. Ecuador*,[565] the IACtHR established the notion of "discrimination by perception" when ruling on the case of a heterosexual man, who had been the victim of discrimination on the grounds of perceived homosexuality. Due to this incorrect perception, he had been dismissed by the Ecuadorian armed forces. The IACtHR established that "discrimination may be based on actual or perceived sexual orientation."[566] For the IACtHR, discrimination by perception "has the effect or purpose of preventing or nullifying the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person who is the subject of such discrimination, irrespective of whether or not that person identifies himself or herself with a particular category."[567] Given this fact, discrimination by perception may constitute a violation of ACHR provisions like Art. 24 ACHR ("Right to Equal Protection before the Law").

Within inter-American case law on discrimination based on sexual orientation, it is also worth mentioning the *Advisory Opinion on Gender Identity, Equality and Non-Discrimination*

[559]Based on that, the IACtHR established the duty of national authorities to strongly enforce the regional decision through the practice of conventionality control. See: Ibid, §282.
[560]Ibid, §§109-110.
[561]Ibid, §§138-139.
[562]See: Jorge Contesse, "Sexual Orientation and Gender Identity in Inter-American Human Rights Law," North Carolina Journal of International Law 44, (2019), 353-385.
[563]IACtHR, (Judgement) February 26, 2016, Case of *Duque v. Colombia*.
[564]Ibid, §139.
[565]IACtHR, (Judgement) August 31, 2016, Case of *Flor Fleire v. Ecuador*.
[566]Ibid, §120.
[567]Ibid.

of Same-Sex Couples (AO OC-24/17) requested by Costa Rica.[568] In this advisory opinion, the IACtHR established that, despite the fact that no explicit definition of discrimination exists in the ACHR, sexual orientation, gender identity and gender expression are categories protected by Art. 1 (1) ACHR. According to the court, the words *any other social condition* from Art. 1 (1) ACHR leave "the categories open to the incorporation of other grounds for discriminations that were not explicitly indicated" in the text of ACHR.[569] Furthermore, the IACtHR emphasized its interpretation that a lack of regional consensus cannot be considered as a valid argument in order to deny or restrict human rights or to reproduce and perpetuate historical and structural discrimination that certain groups and persons have suffered.[570] Based on that, the IACtHR established that the ACHR protects the change of name and the rectification of public records and identity documents in order to conform them to a person's gender identity.[571] Moreover, it established that family ties that may derive from a relationship between persons of the same sex deserve protection and that some institutions, like marriage, should be extended to same-sex couples.[572]

European case law on discrimination based on sexual orientation is very extensive and involved many different issues that range from the past prohibition under criminal law of homosexual relations between adults until more contemporary matters like same-sex partners' right to parenthood and transsexuals' right to legal recognition of gender reassignment.[573] It is necessary to consider the different political contexts and the different time of the decisions when trying to establish any comparison between Latin America and Europe on the matters related to discrimination based on sexual orientation. As Frans Viljoen has pointed out, the Council of Europe has taken a leading role in countering this type of discrimination in Europe.[574] This has also influenced the ECtHR, which has "established itself as the most

[568]IACtHR, (Advisory Opinion) November 24, 2017, *Gender Identity, and Equality, and Non-Discrimination with Regard to Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1 (1), 3, 7, 11 (2), 13. 17, 18, and 24, in Relation to Article 1, of the American Convention on Human Rights, "AO OC-24/17."*
[569]Ibid, §70.
[570]Ibid, §§83, 219.
[571]Ibid, §§85-116.
[572]Ibid, §§199, 218.
[573]On this historical evolution, see: Paul Johnson, Homosexuality and the European Court of Human Rights (Abingdon et al: Routledge, 2013); Frédéric Edel, Case Law of the European Court of Human Rights Relating to Discrimination on Grounds of Sexual Orientation or Gender Identity, (Strasbourg: Council of Europe, 2015); Damian Gonzalez-Salzberg, Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law, (Oxford: Hart Publishing, 2019).
[574]Frans Viljoen, "Minority Sexual Orientation as a Challenge to the Harmonised Interpretation of International Human Rights Law," in *Towards Convergence in International Human Rights Law. Approaches of Regional and International Systems*, eds. Carla M. Buckley, Alice Donald, Philip Leach, (Leiden, Boston: Brill Nijhoff, 2017), 156-192.

progressive body adjudicating such cases."[575] For Viljoen, the IACtHR was able to follow ECtHR's jurisprudence "because the political context within which it functions has, by the time it delivered its first judgement, to a great extent aligned itself with the situation prevailing in Europe."[576] This general convergence between the IACtHR and the ECtHR is illustrated by the references that the IACtHR has made to European decisions. In *Atala Riffo*, the IACtHR mentioned, for instance, the ECtHR's decision in *Salgueiro da Silva Mouta v. Portugal*,[577] whereby the ECtHR established that to withdraw a father's shared custody based on his sexual orientation constituted a violation of his right to have a family life (Art. 8 ECHR).[578] This was the first case in which the ECtHR included sexual orientation as one of the possible reasons for discrimination, which is prohibited according to Art. 14 ECHR.[579]

This general convergence between the IACtHR and ECtHR must not hinder the analysis of the evolution of European jurisprudence on matters related to discrimination based on sexual orientation. This analysis is revealing of the ECtHR's practice of the margin of appreciation and it clarifies under which circumstance the ECtHR defers to national authorities' positions. At least two important case groups are worth mentioning: i) case law of single homosexuals' right to adoption and ii) case law related to transsexuals' rights to legal recognition of gender reassignment. The evolution of European human rights jurisprudence in these different case groups shows how flexible the practice of the margin of appreciation has been within the European context. Initially the ECtHR granted states a wide margin of appreciation of these matters, but later it decided to restrict that margin based on the evolution of human rights law in Europe.

There was a turning point within European jurisprudence concerning the LGBT people's right to individual adoption. Regarding this issue, the ECtHR ruled in *Fretté v. France*[580] that it was in accordance with the ECHR the fact that French authorities restricted adoption to single heterosexuals and excluded single homosexuals. For the ECtHR, states

[575]Ibid,188.
[576]Ibid.
[577]ECtHR, (Judgement) December 21, 1999, Case of *Salgueiro da Silva Mouta v. Portugal*.
[578]Ibid, §36.
[579]"The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as'." Ibid, §28.
[580]ECtHR, (Judgement) February 26, 2002, Case of *Fretté v. France*.

retained a broad margin of appreciation of this matter.[581] Later in 2008, the ECtHR decided to restrict this margin of appreciation in the judgment of *E.B. v. France*,[582] according to which the different treatment was discriminatory and that single homosexuals should have the same right to adoption as single heterosexuals within French law.[583] This decision now constitutes the current standard of European human rights jurisprudence on this matter.

It is interesting to mention that the ECtHR still relies on the concept of the margin of appreciation when deciding cases related to LGBT adoption. The issue of second-parent adoption by same-sex couples is illustrative of this fact. In *Gas and Dubois v. France*,[584] the ECtHR addressed the French prohibition on second-parent adoption by same-sex couples. In this case, two women in a civil partnership had a child through assisted reproduction but only the biological mother was recognized as a parent. The ECtHR found no violation of Arts. 8 and 14 ECHR due to the fact that the applicants were not married, which led to the impossibility of shared parenthood according to French law.[585] As Gonzalez-Salzberg has noted, for the ECtHR, "the fact that different-sex couples would be able to share parental responsibility by getting married, a possibility that *was prohibited to the applicants*, had no relevance" (my emphasis).[586] In fact, the ECtHR has held that there is no obligation on state authorities to grant same-sex couples' access to marriage.[587] Later, in *X and others v. Austria*,[588] the ECtHR addressed again

[581]"It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. (…) Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State." Ibid, §41.
[582]ECtHR, (Judgement) January 22, 2008, Case of *E.B. v. France*.
[583]"The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14". Ibid, §49. The ECtHR ruled that "French law allows single persons to adopt a child (see paragraph 49 above), thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation." Ibid, §94.
[584]ECtHR, (Judgement) March 15, 2012, Case of *Gas and Dubois v. France*.
[585]"[F]or the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple." Ibid, §68.
[586]Damian A. Gonzalez-Salzberg, Sexuality and Transsexuality under the European Convention on Human Rights. A Queer Reading of Human Rights Law, (Oxford: Hart Publishing 2019), 151.
[587]ECtHR, (Judgement) June 24, 2010, Case of *Schalk and Kopf* v. Austria, §§49-64.
[588]ECtHR (Judgement) February 19, 2013, Case of *X and Others v. Austria*.

the issue of LGBT second-parenthood. In this case, the ECtHR ruled that "differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons."[589] The court acknowledged that Austrian law allows second-parent adoption for both married and unmarried heterosexual couples.[590] Due to this fact, the ECtHR held that the prohibition of same-sex couples' second-parent adoption was discriminatory.[591]

There was another turning point within the case law related to transsexuals' right to legal recognition of gender reassignment. In *Rees v. United Kingdom*,[592] the ECtHR decided that there was no positive obligation on the national government to alter the existent system for birth registration to establish any form of legal recognition of gender reassignment. For the ECtHR, this question fell within the state's margin of appreciation of the matter.[593] Only 16 years later, the ECtHR reviewed this interpretation within *Christine Goodwin v. The United Kingdom,*[594] and established that the "unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."[595] Based on that, the ECtHR established that "the respondent Government can no longer claim that the matter falls within their margin of appreciation."[596] Consequently, the ECtHR established a positive obligation based on Arts. 8 and 12 ECHR, according to which some form of legal recognition to gender reassignment had to be established.[597]

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[589]Ibid, §99.

[590]"[T]he Court finds that there was a difference in treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child. That difference was inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation." Ibid, §130.

[591]Ibid, §153. The ECtHR considered that "the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent (…) The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers." Ibid, §144.

[592]ECtHR, (Judgement) October 17, 1986, Case of *Rees v. The United Kingdom*.

[593]"Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation." Ibid, §37.

[594]ECtHR, (Judgement) July 11, 2002, Case of Christine *Goodwin v. The United Kingdom*.

[595]Ibid, §90.

[596]Ibid, §93.

[597]"The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom's margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in compliance with this judgment." Ibid, §120.

In conclusion, despite the general convergence between the IACtHR and the ECtHR on cases relating to discrimination based on sexual orientation, European human rights jurisprudence still differs on issues like the weight granted to regional consensus on the protection against this type of discrimination. Even considering the different political contexts and the different times in which the decisions were made, the ECtHR has traditionally shown a higher level of reliance on the existence or on the lack of regional consensus, while the IACtHR has strongly enforced its own interpretations of regional human rights law, filling the gaps of regional jurisprudence whenever it found it appropriate. Previous case law was also illustrative of how the ECtHR practice of the margin of appreciation has followed the evolution of human rights enforcement in Europe. This has enabled turning points within European human rights jurisprudence. Some issues that were treated with light scrutiny by the ECtHR before, now no longer lead to the ECtHR's deferential attitude to national authorities' interpretation of them. The following part will now describe how legal scholars have tried to find patterns throughout the ECtHR jurisprudence on the margin of appreciation, which can be useful to analyze its potential value for international human rights adjudication in Latin America.

5.2.2. Observing the patterns of ECtHR jurisprudence on the margin of appreciation

The margin of appreciation is a concept of judicial deference to state authorities' policies and interpretations with regard to human rights enforcement. More specifically, it represents a form of judicial self-restraint developed by the ECtHR on certain issues related to the protection of human rights under the ECHR. *Handsyde v. United Kingdom*[598] is the landmark case that illustrates this ECtHR's deferential attitude to state authorities. It is true that the ECtHR also emphasized in this case that Article 10 ECHR "does not give the Contracting States an unlimited power of appreciation" and that "the domestic margin of appreciation thus goes hand in hand with a European supervision."[599] However, the margin of appreciation represents the most prominent specific form of weak international judicial review adopted by an international human rights adjudicative body. The concept has achieved a high level of acceptance in Europe, which can be illustrated by the adoption of Protocol 15 to the ECHR. This protocol, which has not yet come into force, includes references to the concept of the margin of appreciation within

[598]ECtHR, (Judgement) December 7, 1976, Case of *Handsyde v. The United Kingdom*.
[599]Ibid, §49.

the preamble of the ECHR.[600] As is also clear in this chapter, this European concept differs from specific forms of strong international judicial review developed by the IACtHR, i.e., conventionality control and the direct enforcement of socioeconomic rights.

Regarding European human rights jurisprudence, there are several reasons for and against this deferential attitude on the part of the ECtHR. It is worth mentioning the arguments raised within the discussion of the legitimacy and effectiveness of the margin of appreciation. Regarding the reasons for its practice,[601] some scholars have argued that the principle of subsidiarity is the first reason to support the practice of the margin of appreciation within ECtHR jurisprudence.[602] Another reason in favor of the margin of appreciation is that domestic authorities are in a better position to remedy human rights violations, given that they have a better knowledge of the human rights violations in a specific case.[603] The third legitimating reason for the practice of the margin of appreciation involves the reasonable disagreement about rights, which could justify the adoption of different interpretations of human rights law by domestic courts. Due to this reasonable pluralism within the European system, the ECtHR should defer to the national authorities' decisions.[604] The final reason refers to restraining the ECtHR's judicial activism,[605] which is also related to the reasons for deferring to domestic democratic self-governance.[606]

In contrast, some legal scholars have claimed that the practice of the margin of appreciation is illegitimate and ineffective with regard to the protection of human rights in Europe. For George Letsas, the concept as practiced by the ECtHR goes against the universal character of human rights and against a principled way of treating Europeans as free and equal individuals.[607] He has argued that, time and again, the margin of appreciation has represented

[600]According to Article 1 of the Protocol 15, the new text of the final part of the preamble of the European convention will read: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention." Protocol 15 ECHR, art. 1.
[601]Andreas Føllesdal has recently summarized the reasons for and against the practice of the margin of appreciation in Europe. See: Andreas Føllesdal, "Appreciating the Margin of Appreciation," in *Human Rights: Moral or Political?,* ed. Adam Etinson, (Oxford, New York: Oxford University Press, 2018), 269-294.
[602]Ibid, 275.
[603]Regarding this issue, the ECtHR established in *Handsyde v. UK* that, due to epistemic factors, national authorities are in a better position to address the limitations of the human rights established by the ECHR based on offenses to public morality.
[604]Føllesdal, "Appreciating the Margin of Appreciation,", 277.
[605]Ibid, 279.
[606]Ibid, 280.
[607]"The use of the doctrine is altogether unjustified," George Letsas, A Theory of Interpretation of the European Convention on Human Rights, (Oxford: Oxford University Press, 2007), 81.

the enforcement of "moralistic preferences of majorities."[608] For him, the ECtHR has taken "the moralistic preferences of the majority as being synonymous with public morals."[609] This would make the margin of appreciation illegitimate. Moreover, deference to the national level could harm the regional system's goal of promoting the protection of human rights. Similar to Letsas, other scholars have questioned whether deference based on the lack of a regional consensus could also lead to vagueness and legal uncertainty for human rights enforcement in Europe.[610]

Although it is beyond the scope of this study to describe the historical evolution of this concept within the European human rights enforcement context, it is worth addressing patterns in the practice of the margin of appreciation that have emerged throughout ECtHR case law. These patterns of jurisprudence have been described by some studies of the margin of appreciation. One particularly interesting point for the present study is the difference between a wide and a strict margin of appreciation, and their dynamic enforcement throughout European human rights jurisprudence. It is particularly interesting to observe how issues that initially enjoyed a wide margin of appreciation are now dealt with strict scrutiny by the ECtHR. This fact could be observed in the previous section of this chapter, especially with regard to case law involving discrimination based on gender and sexual orientation. Some scholarly works discussed below clarify how this flexibility of the margin of appreciation is related to the evolution of human rights enforcement in Europe. The difference between a wide and a strict margin of appreciation has been addressed in different ways by legal scholars.

Howard C. Yourow has noted that "national discretion analysis has varying uses in the interpretation of different groups of Convention articles"[611] and that there has been "an elasticity in the application of the margin of appreciation" by the ECtHR.[612] For him, the margin of appreciation has been a "very flexible instrument in the hands of shifting majorities"[613] or even "a multifunctional tool in the hands of Strasbourg authorities."[614] He has also claimed that patterns have emerged throughout ECtHR jurisprudence on the margin of appreciation with

[608]Ibid, 120.
[609]Ibid, 121.
[610]These issues have been mentioned by Andreas Føllesdal as common critiques of the practice of the margin of appreciation in Europe, see: Føllesdal, Appreciating the Margin of Appreciation, 283-289.
[611]Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, (Dordrecht: Martinus Nijhoff Publishers, 1996), 186.
[612]Ibid, 192.
[613]Ibid, 193.
[614]Ibid, 194.

regard to different ECHR articles.[615] He has distinguished between the ECtHR enforcement of "due process articles" (Arts. 5 and 6 ECHR) and of "personal freedoms articles" (Arts. 8 to 11 ECHR).[616] For him, the ECtHR practiced intensive jurisprudence on procedural due process cases throughout its initial three decades, and these cases also reflected an "already existing impressive consensus in the law and practice of States Parties."[617] However, the personal freedoms articles were, for him, characterized by "open-ended wordings which do not give rise to easily distinguished autonomous Convention criteria for judgement," and "have stimulated national discretion analysis."[618]

Yutaka Arai-Takahashi has distinguished between policy grounds that justified allowing a wide margin of appreciation to European states and policy grounds that supported more active judicial interference on the part of the ECtHR.[619] For him, morally charged issues like obscenity and blasphemy, and other issues like national security, electoral systems, medical expertise, and socioeconomic policies have led the ECtHR to adopt regional judicial self-restraint.[620] On the other hand, cases involving discrimination on grounds of race, gender, or nationality have been subjected to a more stringent scrutiny of merits, which left little scope for a state's margin of appreciation on these matters.[621] For Arai-Takahashi, "in those areas, the Strasbourg organs are willing to engage in a meticulous examination of the merits," whereby "[a] State is required to adduce weighty evidence for the necessity of an interfering measure."[622]

According to these studies, the difference between the practice of a wide and a strict national margin of appreciation within the European context is based on the nature of the rights involved in a particular case. This is a common interpretation among legal scholars, who have noted that the ECtHR has allowed a national margin of appreciation if a case involves certain articles of the ECHR "that include limitation clauses (Arts. 8-11 ECHR), unequal treatment or non-discrimination (Art. 14 ECHR) and the right to a fair trial (Art. 6 ECHR)."[623] In contrast,

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[615]"The national margin of discretion standard expands or contracts to condone or condemn national action depending, on a case-by-case basis, upon the facts; upon the nature and quality of, necessity for, and proportionality of the rights restriction(s) imposed by the state; and upon the text, context, and precedential value of the Convention provision(s) invoked by the parties or by the international organs themselves." Ibid, 192.
[616]Ibid, 186-188.
[617]Ibid, 186.
[618]Ibid, 187.
[619]Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, (Antwerp, Oxford, New York: Intersentia, 2002).
[620]Ibid, 206-222.
[621]Ibid, 222-230.
[622]Ibid, 222.
[623]Føllesdal, Appreciating the Margin of Appreciation, 272.

"the ECHR has rarely allowed a [margin of appreciation] with regard to non-derogable rights: Arts. 2 (right to life), 3 (prohibition against torture), and 4 (1) [ECHR] (prohibition of slavery and forced labor)."[624] Although this distinction based on the nature of rights seems a good interpretation of the ECtHR practices of the national margin of appreciation, there are opposing views of this interpretation within legal scholarship. Andrew Legg, for instance, has refused to grant high importance to the nature of specific rights or types of cases when analyzing jurisprudence on the margin of appreciation.[625] For him, "external" or "institutional" factors, i.e., those not immediately related to the nature of rights and types of cases, have also played an important role for the practice of inter-institutional deference. He has described the nature of the rights and type of cases as first-order reasons, while the institutional factors represent second-order reasons for the practice of the margin of appreciation.

Regarding these second-order reasons, international authorities tend to yield the final say to the domestic level based on two different types of reasons, namely: i) reasons relating to the democratic legitimacy of state practices and the level of common practice among the member states of an international system; and ii) epistemic limitations and expertise as influential factors in decision-making.[626] Within the first category of reasons, international tribunals tend to yield authority based on the democratic legitimacy of respondent states and the level of common practice among state members.[627] Within the second category of reasons, international courts may rely on institutional confidence to reach a decision for cases in which expertise plays a significant role. International courts may seek recourse to the domestic level when they feel national authorities are in a better position due to their greater knowledge and skills on the matter.[628] In a nutshell, for Legg, deference relies especially on second-order reasons, most importantly "democratic legitimacy, the common practice of states, and expertise."[629]

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[624]Ibid.
[625]"[T]he margin of appreciation operates, structurally at least, in the same way irrespective of the type of right or the nature of the case." Andrew Legg, The Margin of Appreciation in International Human Rights Law. Deference and Proportionality, (Oxford: Oxford University Press, 2012), 3; "It is often said by commentators and judges alike that the nature of right or the type of case is a factor that affects the width of the margin of appreciation or the amount of deference to be accorded to the state. Similarly, it is often said that there are different proportionality tests for different rights or types of case. There is some truth in these propositions, but they are not entirely accurate." Ibid, 200.
[626]Ibid, 24-26.
[627]Ibid, 69-144.
[628]Ibid, 145-174.
[629]Ibid, 219.

George Letsas has also not relied on the nature of rights to describe European jurisprudence on the margin of appreciation. He has distinguished between a substantive and a structural concept of the margin of appreciation.[630] The substantive concept refers to the discretion domestic authorities have within human rights adjudication.[631] If the concept of the margin of appreciation is understood as describing national authorities' discretion, the ECtHR may establish that a specific state authority has or has not acted within its margin of appreciation of the matter.[632] The structural concept does not immediately refer to the discretion of national authorities, but to "the limits or intensity of the review of the ECtHR in view of its status as an international tribunal."[633] If it is understood as a structural concept, the margin of appreciation stands for the institutional interaction between the ECtHR and the member states within the European system for human rights protection. Most importantly, the structural concept of the margin of appreciation limits the authority of the ECtHR within its relationship with national authorities.[634]

Most studies on the national margin of appreciation have affirmed the dynamic character of the practice of international judicial deference to domestic authorities in Europe. Some ECtHR judges have addressed this dynamic character of international judicial review in Europe. ECtHR Judge Dean Spielmann, for instance, has identified some factors that are responsible for this dynamic practice. These factors have included the ECHR provision invoked, the context of the ECtHR's decision, and the existence of general consensus among contracting states.[635] The dynamic character of ECtHR jurisprudence on the national margin of appreciation has also been a consequence of the political side of human rights protection in Europe. Judge Robert Spano has claimed that, due to the evolutive character of European human rights legislation,

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[630]George Letsas, "Two Concepts of the Margin of Appreciation," Oxford Journal of Legal Studies 26, no. 4, (2006), 705-732.

[631]For Letsas, the substantive concept addresses "the relationship between individual freedoms and collective goals." Ibid, 706.

[632]"The substantive concept of the doctrine refers to all the cases where, despite the fact that there was 'interference' with a freedom protected by the ECHR, the interference did not amount to a violation of a right. As such, it presupposes or is linked to a theory, which tells us whether and when interference with fundamental freedoms is impermissible." Ibid, 710.

[633]Ibid, 706.

[634]"On the structural concept, the margin of appreciation imposes limits on the powers of judicial review of the European Court, by virtue of the fact that it is an international court. It is the idea that the Court's power to review decisions taken by domestic authorities should be more limited than the powers of a national constitutional court or other national bodies that monitor or review compliance with an entrenched bill of rights." Ibid, 720-721. For Letsas, the ECtHR has not distinguished between these two different concepts, which has caused much confusion when authorities and scholars refer to the margin of appreciation as practiced within European human rights jurisprudence.

[635]Dean Spielmann, "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?," Cambridge Yearbook of European Legal Studies 14, (2012), 381-418, 394.

the Strasbourg system was entering in the "age of subsidiarity."[636] His argument was a direct response to critiques of European human rights jurisprudence in the last decade.[637] For Judge Spano, the political debate among member states against strong international judicial review in Europe has not only led to the adoption of declarations like the Interlaken (2010) and Brighton (2012) declarations;[638] it has also "created an important incentive for the Court in recent years to develop a more robust and coherent concept of subsidiarity."[639] In line with this, he has argued that the ECtHR has been rethinking the appropriate level of deference to national authorities "so as to implement a more robust and coherent concept of subsidiarity" in accordance with new European human rights legislation like Protocol 15 to the ECHR.[640]

This dynamic practice of judicial deference has arguably occurred due to the more extensive European experience with issues that are inherent in the multilevel inter-institutional interaction regarding human rights protection.[641] This is especially true when we compare the European system with the IAS. In Europe, legal authorities and scholars have been rethinking the terms of engagement between domestic and international authorities much longer than their Latin American peers. In fact, it is only recently that Latin American domestic and international authorities have started to address the most problematic issues deriving from multilevel inter-institutional interaction. Due to this longer European experience, it is unsurprising that European legal authorities and scholars were the first to propose alternatives that could improve the engagement between national and international human rights authorities. Some of these alternatives have involved concepts of deference to national authorities that arguably conform with the ECtHR's reasonable interpretations of the ECHR. Most importantly, as the previous case studies section has demonstrated, international judicial deference to national authorities can change based on the evolution of human rights law over time. As one of the most prominent outcomes of the multilevel inter-institutional interaction for human rights protection in Europe, the concept of the national margin of appreciation can arguably also improve the interaction

[636]Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," Human Rights Law Review 14, (2014), 487-502. For him, this age of subsidiarity is "manifested by the Court's engagement with empowering the Member States to truly 'bring rights home'." Ibid, 491.
[637]Judge Spano's article was a response to: Lord Hoffmann, "The Universality of Human Rights," Judicial Studies Board Annual Lecture, March 19, 2009, available at: https://www.judiciary.uk/announcements/speech-by-lord-hoffmann-the-universality-of-human-rights/.
[638]The Interlaken Declaration involved the adoption of an action plan to reform the European system up to 2019. The Brighton Declaration has led to the adoption of Protocol 15 that includes mentions to the subsidiary principle and the margin of appreciation into the preamble of the ECHR.
[639]Ibid, 491. He has added: "The Court has demonstrated its willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations." Ibid.
[640]Ibid, 498.
[641]See, for instance: Alice Donald, Philip Leach, Parliaments and the European Court of Human Rights, (Oxford: Oxford University Press, 2016).

between inter-American and domestic authorities. The last sections of this chapter will address how this European experience can be useful for the practice of inter-American judicial review within international human rights adjudication.

5.2.3. Interim conclusion: affording national authorities the right margin of appreciation

The previous sections of this chapter have addressed how the margin of appreciation has been practiced by the ECtHR and how legal scholars have interpreted this practice. These sections have also enabled us to observe the differences between European and inter-American human rights jurisprudence regarding the strength of judicial review in theory (scholarship) and in practice (case studies). In comparison to the IACtHR's practices of strong judicial review, the ECtHR has generally adopted weaker forms of judicial review within international human rights jurisprudence. As Basak Çali has explained, these differences in the strength of judicial review have related more specifically to variations in the intrusiveness of the established remedies against violations of the international human rights conventions.[642] While the IACtHR has been known for its highly intrusive jurisprudence,[643] the ECtHR has opted to adopt "a less intrusive and more deferential approach to human rights remedies."[644]

For Çali, the provisions of European and inter-American human rights conventions (*legal design explanation*) and the different history of the two international systems of human rights protection (*case-history explanation*) are not enough to explain this variation in the intrusiveness of remedies. Accordingly, Çali has proposed the *legal culture explanation*, which is arguably the most appropriate theory in this context. According to the legal culture explanation, "shared ideas amongst the members of the courts and commissions"[645] are the most essential elements when seeking to understand the different international approaches to remedies against violations of the conventions. Legal culture is essential for the differences in the intrusiveness of remedies because it serves as the basis for international courts to create new remedies beyond the text of the international human rights conventions.

[642]Basak Çali, "Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders," International Journal of Constitutional Law 16, no. 1, (2018), 214-234.
[643]Ibid, 217.
[644]Ibid, 220.
[645]Ibid, 230.

Based on the legal culture explanation, Çali has noted that the ECtHR "has long seen its role as balancing the effective protection of rights while recognizing its subsidiary role in the protection of human rights,"[646] which has led the court to develop doctrines of deference to the national authorities, like the margin of appreciation. Moreover, the political agency of the Committee of Ministers has also been a decisive element in the nonintrusive approach adopted by the ECtHR within the European system. In contrast, the IACtHR has adopted a more intrusive approach to remedies in Latin America "due to an institutional culture that supports an all-encompassing intrusive role."[647] This institutional culture has been created by the domestic institutional failures but also by the weak agency of the General Assembly of the OAS. Due to this institutional vacuum at both domestic and inter-American levels, the IACtHR has assigned itself a transformative mandate,[648] which is directly related to the practice of strong inter-American judicial review.

Different legal cultures have manifested in differences in the strength of international judicial review in Europe and in Latin America. In Europe, the principle of subsidiarity has played an important role in several treaties that constitute the structure of contemporary European law.[649] The margin of appreciation is just one of the different expressions of this European legal culture that privileges the subsidiary principle.[650] There is no corresponding Latin American legal culture given that there is no scope for stronger international interventions into the countries' domestic affairs in the region. As Chapter I has underscored, European law is much more cosmopolitan than Latin American constitutional law. While subsidiarity has become an essential principle for the allocation of powers between the regional and the domestic level in Europe, in Latin America there is not scope for discussing the subsidiary principle outside the framework of inter-American human rights protection. This restricted scope of the subsidiary principle in Latin America has arguably affected the legal culture of human rights enforcement, given the domestic and international authorities' lack of experience with inter-institutional deference.

[646]Ibid.
[647]Ibid, 232.
[648]Armin von Bogdandy, "The Transformative Mandate of the Inter-American System. Legality and Legitimacy of an Extraordinary Jurisgenerative Process," Max Planck Institute Research Paper Series, no. 16, (2019), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463059.
[649]See, for instance: Katarzyna Granat, The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System, (Oxford: Hart Publishing, 2018).
[650]On this relationship between the margin of appreciation and the principle of subsidiarity see, for instance: Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights," Human Rights Law Review 15, (2015), 313-341.

Despite these different legal cultures in Europe and in Latin America, it is worth mentioning that both systems of human rights protection are dynamic and have the potential to adopt convergent approaches over time, i.e., the IACtHR can adopt weaker forms of international judicial review, while the ECtHR can adopt more intrusive remedies. Although the IACtHR has strengthened its transformative role in the past years and refused to adopt weaker forms of international judicial review, the ECtHR has already increased the strength of remedies in some cases.[651] As examples of this increasing intrusiveness, Çali has mentioned the introduction of the pilot-judgement procedure into the European system and the new application of Art. 46 ECHR in some cases.[652]

The pilot-judgement procedure has been introduced into European human rights jurisprudence as a means of tracing repetitive cases and solving them more efficiently.[653] These cases usually have the same underlying cause within domestic law. For this reason, the ECtHR may establish a pilot judgment in order to cope with its increasing workload. The remedies established in a pilot judgement extend to all similar cases. These remedies have often included general measures to be adopted at the domestic level to resolve the systemic problem that has given rise to the repetitive cases. More often than not, these general measures involve amending domestic legislation. These general measures are also related to new interpretations of Art. 46 ECHR, in which the ECtHR has ordered domestic authorities to amend domestic legislation in order to prevent future human rights violations. Some recent examples of this increasing intrusiveness of international remedies in Europe are worth mentioning.

In *Hutten-Czapska v. Poland*,[654] the ECtHR ordered national authorities to amend domestic housing legislation on the grounds that it had imposed several restrictions on landlord's rights, like setting an extremely low ceiling on rent levels, which made it impossible for landlords to even afford their maintenance costs. In *Manole and Others v. Moldova*,[655] the

[651]It is beyond the scope of this study to fully address the usefulness of strong international judicial review for the European context. However, as Miles Jackson has noted, the ECtHR will likely have to address the compatibility between domestic amnesty laws and the ECHR in the future. See: Miles Jackson, "Amnesties in Strasbourg," Oxford Journal of Legal Studies 38, no. 3, (2018), 451-474.
[652]Çali, Explaining Variation in the Intrusiveness, 223.
[653]On the pilot-judgement procedure, see: ECtHR Press Unit, Factsheet – Pilot Judgements, January, 2019, available at: https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf; Dominik Haider, The Pilot-Judgement Procedure of the European Court of Human Rights, (Leiden, Boston: Martinus Nijhoff Publishers, 2013); *Responding to Systemic Human Rights Violations. An Analysis of "Pilot Judgements" of the European Court of Human Rights and their Impact at National Level*, eds. Philip Leach, Helen Hardman, Svetlana Stephenson, Brad K. Blitz, (Antwerp et al: Intersentia, 2010).
[654]ECtHR, (Judgement) June 19, 2006, Case of *Hutten-Czapska v. Poland.*
[655]ECtHR (Judgement), September 17, 2009, *Manole and Others v. Moldova*.

ECHR ordered national authorities to take general measures, which included legislative reform, to ensure that domestic regulations on public service broadcasting organizations no longer give rise to violations of Art. 10 ECHR. In *Ürper and Others v. Turkey*,[656] the ECtHR ordered national authorities to amend a domestic piece of legislation that had given rise to violations of the journalists' conventional rights according to Art. 10 ECHR.

In *Oleksandr Volkov v. Ukraine*,[657] the ECtHR ordered the Ukrainian authorities to reform the system of judicial discipline. In *Ališić and Others v. Bosnia and Herzegovina et al*,[658] the ECtHR ordered Slovenian and Serbian authorities to amend domestic law to enable the applicants to recover their old foreign-currency savings. In *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,[659] the ECtHR ordered the respondent state to adopt general measures to ensure the establishment of an appropriate legal framework that could guarantee the independent legal representation of mentally disabled individuals. Finally, in *Tagayeva and Others v. Russia*,[660] the ECtHR ordered national authorities to adopt an appropriate domestic legal framework for use of lethal force during security operations.

Similar to what the IACtHR has done when it practices conventionality control, the ECtHR has ordered national authorities to amend domestic legislation, which illustrates the increasing intrusiveness of international remedies in Europe. However, as Çali has pointed out, this intrusiveness has mostly been negotiated with respondent states. Regarding the pilot-judgement procedure, the ECtHR "first informally consults with the respondent states in order to see whether there is appetite for a pilot judgement in the receiving state."[661] Moreover, according to Art. 46 (2) ECHR, the Committee of Ministers, and not the ECtHR itself, is responsible for monitoring compliance with human rights jurisprudence.[662] As we have seen in Chapter IV, issuing monitoring compliance orders in order to guarantee the effectiveness of decisions is one of the elements of strong inter-American judicial review. These factors attest to the fact that the IACtHR still represents the best example of strong international human rights jurisprudence around the globe. Nevertheless, the increasing intrusiveness of international

[656]ECtHR (Judgement), October 20, 2009, Case of *Ürper and Others v. Turkey*.
[657]ECtHR (Judgement), January 9, 2013, Case of *Oleksandr Volkov v. Ukraine*.
[658]ECtHR, (Judgement) July 16, 2014, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*.
[659]ECtHR (Judgement) July 17, 2014, Case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*.
[660]ECtHR (Judgement) April 13, 2017, Case of *Tagayeva and Others v. Russia*.
[661]Çali, Explaining Variation in the Intrusiveness, 224.
[662]ECHR, art. 46 (2).

remedies in Europe illustrates that international human rights courts may be converging regarding the adoption of mixed-form international judicial review.

It is worth emphasizing that this type of mixed-form international judicial review in Europe has been adopted due to the challenges that European human rights authorities currently face. Stronger international scrutiny has been adopted within cases involving less mature constitutional democracies in the European system.[663] As Judge Robert Spano has claimed, disrespect for the rule of law cannot be tolerated in the system, even within the age of subsidiarity.[664] For him, inter-institutional deference within the system should be based on "good faith domestic engagement with Convention principles."[665] He has noted the salient differences among member states regarding the appropriate enforcement of the ECHR provisions. Given this discrepancy, he has argued that "states that do not respect the rule of law (…) and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference" within the system of human rights protection.[666] This is a clear statement in favor of adopting strong international judicial review in cases involving member states with fragile democratic institutions. This statement could also apply to several Latin American countries, as we will see in the next chapter.

Comparing international human rights jurisprudence in Europe and in Latin America does not just reveal the dynamic character of international human rights enforcement throughout history; it also reveals the most important task for lawyers trying to offer the most appropriate forms of international judicial review within human rights adjudication. The international and national authorities in both systems of human rights protection share the same task of interpreting human and constitutional rights. Due to the highly abstract character of most of these rights, granting national authorities a certain level of discretion can be an essential part of the legal interpretation process. Given this fact, the practice of the margin of appreciation should not be understood as a specific feature of the European system of human rights

[663]Basak Çali has also mentioned this fact: "In Europe, the deferential attitude towards well-established democracies continues to lend support to the non-intrusive remedy jurisprudence. Intrusive remedies are characteristically against transition states or stalled transitions with weak domestic rule of law protections and domestic remedies" Çali, Explaining Variation in the Intrusiveness of Remedies, 233.
[664]Robert Spano, "The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law," Human Rights Law Review 18, (2018), 473-494.
[665]Ibid, 492.
[666]Ibid.

protection and it should arguably play an important role in all systems of international human rights protection, which also includes the IAS.

The most important question is whether, in a given case, a wider margin of appreciation is the right solution or whether a stricter international scrutiny is the most appropriate answer. We may call it the question of the right margin of appreciation. Although the answer to this question may change over time for specific case law or with regard to specific human rights provisions, the most important task for lawyers is to determine under which conditions national authorities should enjoy greater discretion and under which conditions they should abide by the international interpretations of the human rights documents.[667] Based on this study's analysis of ECtHR jurisprudence on the margin of appreciation and the scholarly descriptions of this concept, we can conclude that European judicial authorities and scholars have been trying to determine the most appropriate approach to international remedies based on the European human rights enforcement context. This is exactly what legal authorities and scholars should do with regard to the practice of inter-American judicial review in Latin America as this chapter concludes in the following.

5.3. Conclusion: Moving toward a context-based theory of inter-American judicial review

As a translation of the principle of subsidiarity as applied to European human rights law, the national margin of appreciation has been dynamically enforced within ECtHR jurisprudence. Based on concepts like the emergence of a regional consensus regarding a specific issue, it is clear that the practice of the margin of appreciation has evolved in line with the evolution of human rights legislation and jurisprudence in Europe. Although there is no substantive theory of the margin of appreciation that could be detached from this European context of human rights enforcement and exported to Latin America, the practice of the national margin of appreciation has the potential to guarantee the enforcement of the subsidiary principle as applied to human rights protection in Latin America.

The differences between the specific forms of international judicial review are intimately related to the context in which they have emerged. ECtHR jurisprudence has not

[667]I thank Mattias Kumm for clarifying this point to me.

been the only decisive element in ensuring the legitimacy and effectiveness of the national margin of appreciation for international human rights enforcement in Europe. The different practices of the national margin of appreciation have been the product of several factors that are relevant in the European context. The case studies and the scholarly descriptions of ECtHR jurisprudence on the margin of appreciation have emphasized the flexibility of this concept over time. Issues that deserved a wide margin of appreciation in the past, may now be subjected to the strict international scrutiny. The increasing intrusiveness of remedies in Europe is also evidence of this dynamic character of the margin of appreciation within human rights jurisprudence. This dynamic character is due to the more extensive European experience with multilevel inter-institutional interaction. When addressing the possible application of the margin of appreciation to a case, we should not ignore these contextual features of a given legal culture of human rights enforcement.

Latin American and European legal authorities and scholars have been seeking the most appropriate form of international judicial review to address the human rights violations in each context. The practices of conventionality control and the margin of appreciation prompted similar points of debate involving the legitimacy and effectiveness of international judicial review of domestic law based on regional human rights law, like the conditions under which national authorities should enjoy a wider or stricter margin of appreciation. Moreover, these similarities suggest how Latin American lawyers may gain another perspective on the more recent established forms of strong inter-American judicial review. Based on the more extensive European experience with multilevel inter-institutional interaction, it is arguably necessary to refine the practice of inter-American judicial review within the IAS in a way similar to what has been done in Europe.[668] This should be made based on the particular challenges to human rights enforcement in Latin America. In a nutshell, the different interpretations of the national margin of appreciation that can be found in jurisprudence and in legal scholarship may give us good examples of how legal authorities could integrate contextual elements into jurisprudential approaches to international judicial review. This brings us to a final remark about the necessity of a context-based theory of inter-American judicial review.

The final point refers to the implausibility of importing the margin of appreciation as an element in the practice of weak international judicial review without adapting it to the Latin

[668]This will eventually involve the adoption of mixed-form international judicial review, which represents a convergence with the approach adopted by the ECtHR.

American context. Addressing this issue, Laurence Burgorgue-Larsen has pointed out that it is wise to be cautious and to not adopt a "large-scale import operation" of the margin of appreciation to Latin America.[669] For her, "an import without adjustments to the Latin American political context would surely be instrumentalized by states that are still democratically fragile."[670] Trying to change the practice of strong inter-American judicial review without paying attention to the historical evolution of human rights enforcement in Latin America is arguably a mistake. There is no easy way of weakening the practice of inter-American judicial review. An uncritical import of weak international judicial review could put the normative force of the ACHR at risk, which is surely not what Latin American legal authorities and scholars intend. However, affording national authorities greater discretion when interpreting some ACHR provisions that still lack a stronger normative dimension within inter-American human rights law can arguably increase the inter-institutional interaction within the IAS. This increasing interaction has the potential to improve the overall legitimacy and effectiveness of international human rights protection in Latin America. Reconciling strong and weak judicial review in order to improve the legitimacy and effectiveness of human rights law in Latin America is the task of the theory of mixed-form international judicial review, which will be proposed in the following chapter.

[669]Laurence Burgorgue-Larsen, "The Added Value of the Inter-American Human Rights System. Comparative Thoughts," in *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, eds. Armin von Bodgdandy et al., (Oxford: Oxford University Press, 2017), 377-408.
[670]Ibid, 407.

VI. The Theory of Mixed-Form Inter-American Judicial Review

6.1. The Latin American human rights enforcement context

The previous chapters have described the bottom-up and top-down elements of Latin American cosmopolitan constitutionalism. They have also addressed the normative questions relating to the practice of strong inter-American judicial review of domestic law and the alternatives that were proposed for appropriate inter-American human rights jurisprudence. This chapter will propose a mixed-form theory of inter-American judicial review as the most suitable normative model for the Latin American human rights enforcement context. This normative model is intended to strengthen the relationship between domestic and international law regarding the protection of human rights within the IAS. It is also intended to guarantee and strengthen democracy and the rule of law in the region under the thread of global constitutionalism scholarship.

This chapter argues that the IACtHR should introduce weak judicial review into inter-American jurisprudence in a way that is compatible with the evolution of inter-American human rights law. The inter-American adjudication of socioeconomic rights offers the best opportunity to do so. This appropriate introduction of weak review does not mean that the IACtHR should no longer practice strong judicial review. However, the IACtHR should only use strong review as a remedy for flagrant violations that mostly involve the civil and political rights protected under inter-American human rights law. Given that inter-American legislation has focused on the protection of civil and political rights, this chapter argues that the practice of strong review of domestic law by the IACtHR should be limited to the judicial enforcement of these rights. According to the theory of mixed-form inter-American judicial review, it is possible to reconcile the IACtHR practice of strong and weak review, which has consequences for the evolution of inter-American and domestic human rights law.

As this study has already emphasized, mixed-form theory is a context-based theory of human rights adjudication. The first task is to explain what it is meant by the Latin American human rights enforcement context. The most prominent feature of this context has been the persistence of systematic state-perpetrated human rights underenforcement. Systematic human rights underenforcement is part of constitutionalism's tragic cycle in Latin America, which

more than once has ended up in authoritarian rule at the domestic level. At least two major recent factors can illustrate this systematic practices of human rights underenforcement: i) the most recent wave of authoritarianism in the region and ii) the region's increasing material inequality and institutional failure under democratic rule.

6.1.1. The recent Latin American wave of authoritarianism

Latin America is well-known for its history of authoritarian governments. As Roberto Gargarella has described in his studies of Latin American constitutional history,[671] the region was initially open to the liberal North-American and French revolutionary ideas. Later, these ideas of constitutional liberalism were replaced by a very conservative type of government, which was characterized by centralized decision-making. Throughout the 20th century, Latin American constitutionalism saw development in the rights' section of the constitutions like the introduction of social rights as a category of constitutional rights. This led to constitutions with a very progressive catalogue of rights, but a very old-fashioned and centralized structure of power. For Gargarella, it is not a coincidence that authoritarianism has time and again come back to the political stage, given that it is institutionalized in the conservative distribution of power that is evident in many Latin American constitutions. In fact, the survival of authoritarian rule in Latin America has a strong relation with the region's sad history of colonialism, in the face of which legal and constitutional parlance has been, time and again, used to perpetuate oppression and inequality.[672] This history had a catastrophic beginning with the genocide of the native peoples, the acute exploitation of natural resources at the expense of the environment and the introduction of African enslavement in the continent. All of these catastrophic elements still have consequences for most countries up to the present day.[673]

Even if it is true that most of the challenges for constitutionalism have long been present in the region, Latin America has seen the emergence of a recent wave of authoritarianism in the past decades. This is especially evident when we consider the work of the regional commission

[671]Roberto Gargarella, Latin American Constitutionalism, 1810-2010. The Engine Room of the Constitution, (Oxford: Oxford University Press, 2013).
[672]In a historical interpretation, see: Roberto Gargarella, The Legal Foundations of Inequality. Constitutionalism in the Americas, 1776-1860, (Cambridge: Cambridge University Press, 2010).
[673]According to Boaventura de Sousa Santos, capitalism, colonialism and patriarchalism have always posed serious challenges for the government of free and equals in the Global South. See: Boaventura de Sousa Santos, Epistemologies of the South. Justice Against Epistemicide, (New York: Routledge, 2016).

for human rights protection (IACHR). The IACHR is supposed to act as the most immediate human rights watcher in Latin America and its country reports have illustrated the escalation of domestic authoritarian practices in recent years. One distinguishing feature of these domestic practices is that they are not restricted to a few episodes of serious human rights violations that, ultimately, could be acknowledged by the inter-American institutions in order to hold national authorities accountable. Addressing these illiberal practices, lawyers find out that some states have acted as recurrent and deliberate human rights violators, which have underenforced constitutional and conventional rights based on inexcusable interests, most of them related to power and money. Some governments have dealt with human rights enforcement in an unprincipled way and have regarded inter-American institutions as a threat to what they understand as *sovereignty*, i.e., their authoritarian governments. In a nutshell, they have brought back once again the well-known Latin American *realpolitik* on human rights enforcement.[674] There are currently two most salient examples of this phenomenon, namely Venezuela and Nicaragua.

Venezuela has been one of the most prominent examples of Latin American authoritarian government in the past decades. Paradoxically, authoritarianism took power under the rule of the new 1999 constitution, which represents one of the most promising constitutional documents on human rights in the region. The main authoritarian actor in the country has been the ruling Venezuelan Unified Socialist Party, especially during the administrations of Hugo Chavez (2007-2013) and Nicolás Maduro (since 2013). According to the most recent IACHR report on Venezuela,[675] although there has been a gradual deterioration of human rights enforcement since the beginning of closer regional surveillance in 2002, human rights violations escalated in 2017. The IACHR addressed several causes of the current crisis in the country, which has even become a humanitarian crisis responsible for many citizens emigrating to neighbor countries in the last years. For the IACHR, the key reasons for this crisis have been the substantial changes of the Venezuelan constitutional order, which were intensified in 2017.[676]

The executive and the Venezuelan Supreme Court have ignored the separation of powers throughout the last years. The alteration of the 1999 constitutional order has happened

[674]This *realpolitik* clarifies how the establishment of the IAS was possible during the rule of dictatorships in Latin America throughout the 20th century.
[675]IACHR, Country Report: Situation of Human Rights in Venezuela, December 31, 2017, available at: http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf.
[676]Ibid, §73.

mostly due to the "interference by the Executive in the Judiciary and, in turn, by the Judiciary in the Legislature."[677] The report mentioned several threats to democracy and to the rule of law in the country. These threats have included serious restrictions to the exercise of civil liberties and political rights in Venezuela such as: i) various types of harassment and persecution of the opposition, ii) postponements of regional and municipal elections; iii) repression, stigmatization and criminalization of social protests in the form of arbitrary detentions, torture and even sexual violence against civilians;[678] iv) denial of access to justice and due process, with civilians reportedly being prosecuted and tried in military criminal courts; v) proliferation of legal provisions that restrict the right to freedom of thought and expression based on broad concepts such as national security and public order, and vi) the denial of access to public information through vague exceptions.

Two judgements can illustrate important features of the changing Venezuelan constitutional order in 2017, which are specifically related to the disregard for the rule of law in the country: Judgements *No. 155* and *No. 156* by the Venezuelan Supreme Court.[679] The first judgement established the unconstitutional character of the enforcement of the Inter-American Democratic Charter, which was proposed by an agreement passed by the National Assembly.[680] The Supreme Court invalidated the enforcement of this charter and called the passing of the agreement by the Assembly "treason," because it allegedly brought foreign interference into the resolution of domestic affairs. *Judgement No. 156* granted the executive broad powers in respect of oil and gas, which constitute important sources of money to finance the authoritarian politics of the ruling government. The current Venezuelan administration has also explicitly weakened its commitments with regard to human rights enforcement. Illustrative of this attitude was the withdrawal from the ACHR in 2013 and also the withdrawal of a member from the OAS Charter in 2017, which represented the first ever withdrawal from the membership of this international organization since its creation in 1948. These withdrawals represent a reaction against the work of inter-American institutions that have been reporting systematic human rights violations in the country for over a decade. They are ultimately a reaction against the

[677]Ibid, §75.
[678]The escalation of violence and repression against the citizenry is illustrated by the adoption of the "Plan Zamora" in 2017. According to the IACHR, this civilian-military plan, which was established in 2012, was supposed to be enforced only in cases of environmental catastrophes, since it involves the use of military units for citizen security tasks; Ibid, §377. Through the declaration of this plan and of several other lengthy states of emergency, the Venezuelan government has tried to offer a legal basis for all its discretionary powers, no matter if they involve serious human rights violations like arbitrary detentions, torture and extrajudicial executions. Ibid, §§ 383, 386.
[679]Ibid, §§103-105.
[680]This inter-American document was adopted in order to guarantee the rule of democratic governments in the Americas. This chapter will address it with more attention below.

international community, which has condemned the serious human rights violations committed by the ruling government.

Beyond Venezuela, Nicaragua represents another example of systematic state-perpetrated authoritarianism. The authoritarian practices pose a substantial threat to the enforcement of constitutional rights, the rule of law, and democracy in this country. This rising authoritarianism was addressed by the IACHR in its 2018 report on the human rights situation in Nicaragua.[681] In April 2018, public demonstrations and social protests spread around the country due to a fire that was not properly extinguished in a biological reserve and a reform of social security legislation that increased workers and employees' contributions and established a 5% deduction to the pensions of retirees.[682] The IACHR reported that the state response to the social protests was unreasonable. The commission concluded that state officials, based on the presumption that the civil protests could lead to a *coup d'état*,[683] severely repressed the political demonstrations by, among other means, i) the excessive and arbitrary use of police force, ii) intimidation and threats against leaders of social movements, iii) by establishing obstacles to access emergency medical care for the wounded as a form of retaliation of their participation in demonstrations, and, finally, iv) by the dissemination of propaganda and stigmatization campaigns, followed by improper interference in the media.[684]

The state representatives argued that the need to maintain public order and social peace justified the severe repression of the demonstrations. Several episodes of widespread violence happened after the repression of the first protests, which included, for instance, the attack on a peaceful march on Mothers' Day (May 30, 2018) that caused 15 deaths and 199 people wounded.[685] The IACHR reported that private groups were acting with the acquiescence of state officials and that there has been a widespread distrust among victims in filing complaints against human rights abuses due to the lack of appropriate investigation and judicial independence.[686] For the IACHR, the situation was critical to the point that it affected the mental health and emotional well-being of the entire population.[687] As a consequence of the

[681]IACHR, Country Report: Nicaragua. Gross Human Rights Violations in the Context of Social Protests in Nicaragua, June 21, 2018, available at: http://www.oas.org/en/iachr/reports/pdfs/Nicaragua2018-en.pdf.
[682]Ibid, §§33-46.
[683]Ibid, §53.
[684]Ibid, §58.
[685]Ibid, §48.
[686]Ibid, §§18, 193, 232, 234.
[687]Ibid, §159.

severe repressions of the citizenry, numerous people have been forced to leave their homes as well as emigrating to other countries to seek protection.[688]

Venezuela and Nicaragua are examples of countries where civil rights and political liberties are still systematically endangered by state-perpetrated authoritarian practices in Latin America. These contemporary authoritarian governments exhibit very similar features to previous Latin American dictatorships. Despite having a different political ideology to some previous authoritarian regimes, there are few differences with regard to the severe repression of the citizenry. This is even more evident in the most recent report from the U.N. High Commissioner for Human Rights, Michelle Bachelet, on the contemporary human rights situation in Venezuela.[689] In this report, Ms. Bachelet, a left-wing politician who ruled Chile for two terms (2006-2010, 2014-2018) and who once considered Hugo Chávez a political colleague in South America, denounced the arbitrary detentions, and the allegations of torture and extrajudicial executions that have been perpetrated by the Venezuelan government especially since Nicolás Maduro took office.[690] In conclusion, regardless the political ideology, the persistence of authoritarian rule has been remarkable within some Latin American countries and constitutes the first prominent element of the Latin American context for human rights practices.

6.1.2. Material inequality and institutional failure under democratic rule

Beyond the traditional violations of civil rights and political liberties, the Latin American context of state-perpetrated human rights underenforcement also involves questions of material inequality and institutional failure. This study will now address these issues as a different type of challenge for human rights enforcement in the region. Material inequality in Latin America refer to the fact that social gap between the poorest and the richest people in the

[688]Ibid, §§220-221.
[689]United Nations High Commissioner for Human Rights, Human Rights in the Bolivarian Republic of Venezuela, July 5, 2019, available at: https://www.ohchr.org/Documents/Countries/VE/A_HRC_41_18.docx.
[690]The report also accused Chavez's government of being responsible for serious human rights violations in the country: "For over a decade, Venezuela has adopted and implemented a series of laws, policies and practices, which have restricted the democratic space, weakened public institutions, and affected the independence of the judiciary. Although these measures have been adopted with the declared aim of preserving public order and national security against alleged internal and external threats, they have increased the militarization of State institutions and the use of the civilian population in intelligence gathering and defence tasks." Ibid, §76. The report further concluded that "[t]his context has enabled the Government to commit numerous human rights violations." Ibid, §77.

region has increased, despite the overall economic growth at the domestic level. The amount of national wealth has grown, but it has been more and more unequally shared within the countries. According to the World Inequality Database, the top 1% of Latin American earners share 27.9% of the total regional income.[691] In some countries, the scenario is even more extreme: the richest 1% of Brazilians share 28.3% of national income, which makes the country figure among the most socially unequal in the world.[692] The regulatory framework has played a significant role for Latin America becoming one of the most unequal regions in the world. Socioeconomic rights underenforcement has been both the product of and the agent of increasing material inequality in Latin American countries.

Historically, Latin American authorities have been responsible for the conceptualization of socioeconomic rights as both constitutional rights and a category of human rights. The 1917 Mexican constitution was a pioneering constitutional document for including socioeconomic rights among rights protected by the constitution. Latin American lawyers were also influential advocates for the inclusion of socioeconomic rights into the text of the Universal Declaration of Human Rights.[693] Despite this Latin American contribution to the concept of socioeconomic rights as enforceable rights, several historical factors have blocked their enforcement at the national and international levels. In the region's recent history, these have largely related to controversial neoliberal macroeconomic agendas. There are several ways of approaching neoliberalism from a legal perspective.[694] The most relevant approach for this study entails a focus on the relationship between neoliberal policies and the state-perpetrated systematic underenforcement of socioeconomic rights. Neoliberal policies prevent domestic enforcement of socioeconomic rights due to new regulatory frameworks, which, in turn, may result in increasing material inequality. There have been examples of this phenomenon in some Latin American countries.

[691]World Inequality Database, Region View: Latin America, available at: https://wid.world/world/#sptinc_p99p100_z/US;FR;DE;CN;ZA;GB;WO/last/eu/k/p/yearly/s/false/4.8255/30/curve/false/region.

[692]Brazil figures together with India and other Middle-East countries as one of the most unequal countries in the globe with regard to wealth concentration. See: World Inequality Database, Country Report: Brazil, available at: https://wid.world/country/brazil/.

[693]On this issue, see: Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent, (Philadelphia: University of Pennsylvania Press, 1999); Mary Ann Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Ideal," Harvard Human Rights Journal 16, (2003), 27-39. See also: Kathryn Sikkink, "Latin America's Protagonist Role in Human Rights," SUR 22, (2015), 207–219.

[694]See, for instance, Alexander Somek's analysis of the relationship between neoliberalism and anti-discrimination law within the European Union: Alexander Somek. Engineering Equality. An Essay on European Anti-Discrimination Law, (Oxford: Oxford University Press, 2011), 83-89.

After the 1980s, Latin American governments adopted a series of macroeconomic policies known as the "Washington consensus," which usually involved the restriction of state interference in the economy and the establishment of free markets.[695] These policy recommendations from the International Monetary Fund and the World Bank were seen as essential for national macroeconomic development. They were supposed to reduce public debt, control inflation, stabilize the currency, and attract foreign investments. However, these neoliberal policies have resulted in the systemic underenforcement of socioeconomic rights due to social spending cuts. Governments were encouraged to underenforce these constitutional rights based on an agenda that privileged fiscal responsibility and economic growth. After years of their implementation, such policies have contributed to the escalation of material inequality in countries like Chile and Argentina.[696]

Beyond the domestic level, neoliberalism has had consequences for the enforcement of socioeconomic rights as a category of human rights at the international level as well. A recent account of this fact comes from Samuel Moyn,[697] who has affirmed that the age of human rights has paradoxically become "a golden age for the rich."[698] Moyn has referred to a triumph of market fundamentalism starting in the 1970s and has argued that "human rights conformed to the political economy of the age, not defining it but reflecting it."[699] For him, "a neoliberal campaign against welfare at every scale made human rights its hostages."[700] The result was that an accommodating relationship between neoliberalism and human rights has made "the globe more humane but enduringly unequal."[701] It is true that Moyn has stressed that human rights did not bring the neoliberal age about[702] and that "human rights law and movements strove for a greater amount of valid social pluralism than ever defended."[703] However, the complacent attitude to neoliberalism on the part of human rights advocates has had severe consequences for the problem of material inequality around the globe.[704]

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[695]On the Washington consensus, see: Nancy Birdsall, Augusto de la Torre, Felipe Valencia Caicedo, "The Washington Consensus: Assessing a 'Damaged Brand'," in *The Oxford Handbook of Latin American Economics,* eds. José Antonio Ocampo, Jaime Ros, (Oxford: Oxford University Press, 2011), 79-107.
[696]On this issue, see: Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism, (London: Penguin Books, 2007).
[697]Samuel Moyn, Not Enough. Human Rights in an Unequal World, (Cambridge, MA; London: Harvard University Press, 2018).
[698]Ibid, 5.
[699]Ibid, 8.
[700]Ibid.
[701]Ibid, 11.
[702]"Neoliberalism, not human rights, is to blame for neoliberalism;" Ibid, 192.
[703]Ibid, 202.
[704]He has emphasized this point in several passages of his book. For him, human rights "did nothing to interfere with distributive inequality;" Ibid, 176. Human rights "were companions to neoliberalism that did pressingly little

It is beyond the scope of this study to fully address questions relating to material inequality in Latin America. This study will restrict its analysis to the relation between increasing inequality and the state-perpetrated systematic underenforcement of socioeconomic rights. The focus here lies on how lawyers can respond to these systematic obstacles to socioeconomic rights enforcement. In this chapter, this study offers weak judicial review as a viable approach to the judicial enforcement of these rights at the domestic and inter-American levels. In the following, this section will briefly address institutional failure as another persistent element in state-perpetrated systematic human rights underenforcement in Latin America.

Institutional failure under democratic rule relates to the misuse of democratic institutions and the disregard for the rule of law based on illegitimate interests. This can be illustrated by what some scholars have described as the lack of *institucionalidad*, i.e., the absence of institutional credibility, as Armin von Bogdandy has described.[705] For him, *institucionalidad* translates into a high degree of trust in the rights, guarantees and institutions established in the constitution. He has noted that Latin American lawyers usually refer to clear institutional differences between the "Northern situation" and Latin America.[706] In this sense, the lack of *institucionalidad* relates to structural problems in Latin American democracies that are well known, i.e., weak institutions that cannot cope with traditional problems like corruption and social exclusion. Legal scholars have time and again addressed the traditional disregard for institutions in Latin America. Before these more recent discussions of the lack of *institucionalidad* mentioned by Von Bogdandy, Guillermo O'Donnell was the most prominent thinker who addressed the institutional failures in Latin American countries.

For O'Donnell, a common feature of these countries has been their "poorly functioning states"[707] that, even under democratic rule, have been "deaf to the demands and interests of

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to alter its course;" Ibid, 192. They "made the world more humane without challenging neoliberal globalization;" Ibid, 194. Despite the relevance of human rights within international legislation, "international law furnished no redistributive tools among countries" and "there was never any globalization of social justice;" Ibid, 196. In the end, "in a world-historic breakthrough of increasing recognition, everyone was treated more equally, except materially." Ibid, 203.

[705]Armin von Bogdandy, "Ius Constitutionale Commune en América Latina. Observations on Transformative Constitutionalism," in *Transformative Constitutionalism in Latin America,* eds. Armin von Bogdandy et al., (Oxford: Oxford University Press, 2017), 27-48.

[706]Von Bogdandy has claimed that "to be sure, there are deep problems even in Europe (…) However in Latin America, systemic deficits in the rule of law are much more frequently found and are a constant theme." Ibid, 36.

[707]Guillermo O'Donnell, "An Overview of Latin America", in *Democracy, Agency and the State: Theory with Comparative Intent*, (Oxford: Oxford University Press, 2010), 146. For O'Donnell, "big or small in the size of their bureaucracies, these states are weak. Some of them have been weak since their beginnings, and some have recently weakened, oddly enough, under democracy. Truly, in the past some of these states were efficacious

large parts of its population."[708] In this context, O'Donnell suggested "delegative democracy" as an adequate descriptive model of Latin American governments.[709] He distinguished delegative democracies from representative democracies: Representative democracies are based on accountability of the government by several institutions, while delegative democracies share an anti-institutional bias. For O'Donnel, within delegative democracies, the institutions that are responsible for holding the authorities accountable are seen as obstacles by the rulers, especially by elected presidents: "Accountability to such institutions appears as a mere impediment to the full authority that the president has been delegated to exercise."[710] The anti-institutional bias of delegative democracies is also illustrated by the ruler's willingness to "try hard, and often succeed, to cancel, co-opt or otherwise neutralize"[711] democratic institutions.

O'Donnell claimed that Latin American governments have traditionally ignored the task of enforcing civil and socioeconomic rights, which has had consequences for how the state bureaucracy is perceived by parts of civil society. Many citizens perceive the state as an advocate for the interests of the rich and powerful.[712] Indeed, according to the 2018 *Latinobarómetro* report, Latin Americans share a deep distrust of democratic institutions.[713] In 2013, 79% of the interviewees agreed that democracy was the best system of government. In 2018, this had fallen to 65%. In countries like Brazil, the decrease was even more extreme: from 81% in 2013 to 56% in 2018. Still according to this report, 79% agreed that politicians govern based on the interest of a few groups in society. In Brazil, this number reached 90% in 2018. The most credible institutions in Latin America are religious institutions (63%), the armed forces (44%), and the police (35%). The government (22%), the congress (21%), and political parties (13%) are the least trusted institutions. In Brazil, trust in political parties was shared by just 6% of the interviewees in 2018. Although institutional failure has not necessarily led to support for authoritarianism in the region, it has led to the indifference towards politics. For instance, just 34% of the Brazilians interviewees declared themselves in favor of

repressive machines, but neither at those times nor after have they managed to achieve the minimum that a reasonably strong state does: to socially cohere and legally normalize their societies and nations;" Ibid, 148.
[708]Ibid, 148.
[709]Guillermo O'Donnel, "Delegative Democracy," Journal of Democracy 5, no. 1, (1994), 55-69.
[710]Ibid, 60.
[711]O'Donnel, Overview of Latin America, 162.
[712]O'Donnel, Overview of Latin America, 149; O'Donnell concluded that "the Latin American state is scarcely credible." Ibid.
[713]Latinobarómetro, 2018 Report, available at: http://www.latinobarometro.org/lat.jsp.

democracy, while 41% declared themselves indifferent to it. The report concluded that this indifference has become a revolutionary factor in Latin American politics in the last years.[714]

Beyond the *Latinobarómetro* report, there is further evidence of the lack of institutional health in Latin America. It is worth mentioning two most illustrative factors of it: systemic corruption and the substantial obstacles to governability that have, time and again, resulted in presidential impeachments. Regarding the first factor, Marcelo Neves has argued that peripheral countries in world society suffer from systemic corruption.[715] For him, systemic corruption blurs the lines between different social systems and does not allow them to further operate in an autonomous way.[716] Systemic corruption has distorting effects on democracy, human rights enforcement, and the rule of law. In peripheral countries, the legal system is more likely to be subjected to direct influences from the economic and the political system.[717] The institutional failure of Latin American countries has been at the same time the product of and one of the most prominent elements of systemic corruption in the region. Several institutions cannot function as they are supposed to due to the direct and constant influences of illegitimate interests.[718]

[714]With respect to Brazil, the *Latinobarómetro* report also referred to the results of the 2018 election based on the country's collected data: "A country where satisfaction with democracy collapses in this way, where 73% of citizens do not vote by party, where only 34% support it and 41% are indifferent towards it, is a country ready to choose a candidate who is located outside the establishment and who wants to break with everything established;" Ibid, 37.

[715]Marcelo Neves, "Systemkorruption von der Organisation zur Gesellschaft: Grenzen der Funktionalen Differenzierung von Recht und Politik in den Peripheren Ländern. Bemerkungen im Anschluss an Niklas Luhmann," *in Verfassung und Verfassungsgericht: Deutschland und Brasilien im Vergleich*, eds. Rainer Schmidt, Virgílio Afonso da Silva, (Bade-Baden: Nomos, 2012), 59-72.

[716]Marcelo Neves, "From the Autopoiesis to the Allopoiesis of Law," Journal of Law and Society 28, no. 2, (2001), 242-264; See also: Marcelo Neves, "Komplexitätssteigerung unter Mangelhafter Funktionaler Differenzierung: Das Paradox der Sozialen Entwicklung Lateinamerikas," in *Duch Luhmanns Brille. Herausfroderungen an Politik und Recht in Lateinamerica und in der Weltgesellschaft*, eds. Peter Birle, Matias Dewey, Aldo Mascareño, (Wiesbaden: Springer Verlag, 2012), 17-27.

[717]Corruption of the legal system can be illustrated, for instance, by the purchase of a judicial decision, which characterizes a non-legitimate interference by the economic system.

[718]The Car Wash Operation is illustrative of the distorting effects of systemic corruption in Brazil. This investigative operation began in 2014 and ended up uncovering one of the biggest corruption scandals in Brazilian history. The investigations initially aimed at uncovering money laundering, but they soon found a web of corruption involving some of Brazil's biggest companies and several political parties. Among other things, the investigation discovered a link between overpaid contracts and the funding of election campaigns to keep the governing coalition in power. After tracing the overall corruption within the political system, the operation led to what can be called the "judicialization of politics" in Brazil: Many influential politicians were sent to jail based on accusations derived from plea bargains. In some of these cases, the justification for the decisions was mostly based on the plea bargain and not on the established proof in the case. At the same time, the operation represented the "politicization of the Brazilian judiciary:" Some judges became influential in the media and acquired considerable political charisma. One of the leading judges of the Car Wash Operation, Mr. Sergio Moro, has even opted to join the 2018 elected government of Jair Bolsonaro as a Minister of Justice

The relation between systemic corruption and institutional failure has also had consequences for governability in Latin America. Presidential instability has been a constant element of the institutional failure in the region. The various cases of alleged corruption in Latin American countries were responsible for the impeachment of several heads of state in the past years. According to a recent study, Latin American presidents have been subject to 10 impeachments or "declarations of incapacity" in the past 30 years.[719] Brazil, Ecuador and Paraguay lead these statistics, each with 2 presidential impeachments in their most recent democratic history. As O'Donnell rightly put it, the process of institutionalization takes time and it is an even greater challenge than the transition to democracy in Latin America.[720] One of the consequences of governance instability in the region is that it has become extremely difficult to strengthen democratic institutions within the highly unstable political environment in Latin America. For O'Donnell, crises demand strong institutions but, in Latin America, crises also hinder the further institutionalization of domestic democracies. Latin America seems to be cast into a vicious circle of institutional failure under democratic rule.

6.2. The theory of mixed-form inter-American judicial review

The issues relating to authoritarian governments, systematic underenforcement of socioeconomic rights, and institutional failure addressed above have formed the background of inter-American human rights enforcement in Latin America. The inter-American institutions have evolved in this context. They have tried to cope with systematic state-perpetrated human rights violations in an innovative way. The emergence of strong inter-American judicial review can be understood as a response to these traditional domestic issues. Conventionality control was a response to the systemic underenforcement of civil and political rights, while the direct enforcement of socioeconomic rights was a response to the systematic underenforcement of this second category of rights.

This study will now propose a theory of mixed-form inter-American judicial review as the most suitable normative model for inter-American human rights jurisprudence. This theory asks whether strong-form review is always the most appropriate way of dealing with the

[719]See: Aníbal Pérez-Liñan, John Polga-Hecimovich, "Explaining Military Coups and Impeachments in Latin America," Democratization 24, no. 5, (2016), 839-858. There is a very illustrative picture of the lack of governability in the region provided by Americas Quarterly. See: Brian O'Boyle, "President No Longer," https://www.americasquarterly.org/content/president-no-longer.
[720]O'Donnell, Delegative Democracy, 68.

different types of human rights violations in Latin America that were described above. This study argues that, while strong inter-American review is more suitable for reviewing domestic legislation on civil and political rights, weak review might be the best form of decision-making in cases involving socioeconomic rights. This mixed-form theory is in principle against the practice of strong-form review in cases involving socioeconomic rights, which is the approach that the IACtHR will likely adopt based on the evolution of inter-American case law on these rights. Yet, before addressing the theory of weak judicial review and its usefulness for domestic and inter-American human rights law, it is worth addressing a major counter-argument with regard to the distinction between civil and socioeconomic rights.

When distinguishing between civil and socioeconomic rights, the concepts of positive and negative duties are usually taken as decisive elements. According to this interpretation, civil rights primarily demand that state authorities refrain from action (e.g., the right to freedom of speech), while socioeconomic rights demand a proactive attitude from the state (e.g., the right to education). For some legal scholars, this rights typology based on positive and negative duties might sound old-fashioned for several reasons. First, there is the fact that civil rights enforcement might also require a proactive attitude from state authorities. Beyond the fact that rights enforcement more often than not overlaps these different categories of rights, some scholars avoid the distinction between civil and socioeconomic rights for another good reason. When differentiating between civil and socioeconomic rights, some scholars have implied that only the former could be judicially enforceable, while the latter would have a programmatic character. When lawyers oppose the traditional rights typology, they usually do so because they resist the interpretation that socioeconomic rights should be taken only as intentions to promote collective welfare. In effect, they oppose any kind of hierarchy between those rights and aim at giving socioeconomic rights more authority. As some scholars have noted, this has been hindered by the traditional distinction to civil and political rights. According to the 1993 Vienna Declaration on Human Rights, "all human rights are universal, indivisible, interdependent and interrelated."[721] This provision is often cited as an argument that socioeconomic rights should enjoy equal authority with civil rights.[722]

It is true that rights enforcement usually fails to draw strict lines between categories of rights and that the distinction between civil and socioeconomic rights has often led to the

[721]1993 Vienna Declaration on Human Rights, art. 5.
[722]See, for instance: Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties, (Oxford: Oxford University Press, 2008).

interpretation that the latter should not be judicially enforceable. Nevertheless, the distinction is not useless if we consider the evolution of inter-American human rights legislation and jurisprudence. This is the main reason why this study insists on this distinction within the theory of mixed-form inter-American judicial review. This theory is based on the contemporary challenges associated with the judicial enforcement of different rights claims. It does not state that socioeconomic rights have a programmatic character, but it does claim that their enforcement is more difficult and might probably demand more from a multi-institutional approach. There are many factors responsible for that, but a prominent one is the lack of settled understandings about legislation and jurisprudence on socioeconomic rights within the inter-American framework for human rights enforcement.

Civil and political rights claims might be easier to settle based on the substantial existent material regarding their interpretation. By contrast, the judicial enforcement of socioeconomic rights is a new feature of constitutional democracies and even more recent in international contexts of adjudication. The judicial enforcement of socioeconomic rights is triggered by recent transformative constitutions at the domestic level. These new constitutions have a substantial catalogue of social rights and courts have started to directly enforce them by means of constitutional interpretation. At the inter-American level, the evolution of documents on socioeconomic rights is also a recent feature of inter-American human rights legislation. Due to this late evolution, courts might necessarily have to adopt weak-form judicial review in order to cope with the challenges associated with socioeconomic rights enforcement.

In the following sections, this chapter will first introduce the theory of weak judicial review in more general terms. Then, it will trace the approaches within legal scholarship that best fit what it is meant by weak judicial review as a system thought based on the challenges to judicially enforcing socioeconomic rights. After that, this chapter will discuss the legitimacy and effectiveness of weak judicial review in the domestic and international contexts of adjudication. Finally, this chapter will address inter-American judicial review allocation, i.e., when strong inter-American review is more appropriate and when weak review might be the best option for the IACtHR.

6.2.1. The theory of weak judicial review

As Chapter IV has explained, the strong judicial review of legislation might not always seem a reliable option due to the problems with its legitimacy and effectiveness. Based on that, lawyers may be tempted to turn their attention to theories of weaker forms of judicial review. For some lawyers, weak judicial review has the potential to reconcile judicial lawmaking with democratic legitimacy, given that courts may adopt a dialogic form of decision-making and will not necessarily have a final say on the disputed issue. Moreover, weak judicial review could increase the effectiveness of judicial decisions, given that it relies on institutions beyond the judiciary to settle complex disputes.

The theory of weak judicial review was first developed by Steven Gardbaum in his studies of constitutional law in some Commonwealth countries.[723] For him, new development in constitutionalism in countries like Canada, New Zealand, and especially in the UK might offer a third way out of the "bipolar universe" of legislative against judicial supremacy. This third way is also an intermediate and hybrid way of inter-institutional communication. Within systems of weak review, political and judicial rights review are combined. According to his description of weak judicial review, a piece of legislation is first submitted to a *pre-enactment political rights review*; later, it can be judicially reviewed and, finally, it goes back to legislatures for a *post-enactment political rights review*.[724] Gardbaum has emphasized that the third stage is central to weak review systems, since the last say on a piece of legislation is granted to legislatures. Based on that, weak review systems preserve judicial review as a controlling mechanism of legislative failures but also decouple constitutional review from judicial supremacy.[725]

The UK has represented an important example of a weak review system since the enactment of the UK Human Rights Act (HRA) in 1998. According to Section 4 HRA, courts are able to issue a "declaration of incompatibility" between primary legislation and the HRA.[726] Nevertheless, according to subsection 6, this declaration of incompatibility "does not affect the

[723]Steven Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice, (Cambridge: Cambridge University Press, 2013).
[724]"In essence, the new Commonwealth model of constitutionalism consists in the combination of two novel techniques for protecting rights. These are mandatory pre-enactment political rights review and weak-form judicial review." Ibid, 25.
[725]"The critical, and distinctive, hybrid feature of the new model is the legislative power to override the exercise of constitutional review of legislation by the courts." Ibid, 45.
[726]1998 UK HRA.

validity, continuing operation or enforcement of" primary legislation, nor is it "binding on the parties to the proceedings in which it is made."[727] The new system of judicial review established by the HRA is a conciliatory system between legislative and judicial lawmaking and, therefore, it is illustrative of weak judicial review in practice.

There have been critical approaches to Gardbaum's judicial review typology. Aileen Kavanagh, for instance, has called it an "unreliable and misleading way of categorizing systems."[728] For her, the strong-form/weak-form typology is "shallow" because it focuses on formal features of constitutional orders and ignores a "broader political and constitutional context;"[729] it is also "narrow" because it measures the strength of judicial review in terms of the final word to strike down pieces of legislation.[730] It is worth responding to Kavanagh's critical points, since this response strengthens the arguments in favor of the usefulness of the distinction between strong and weak judicial review.

Kavanagh is right when she takes a "hard look at the last word"[731] as a defining feature of Gardbaum's model. Nevertheless, her arguments have a problematic empirical focus. She has claimed that provisions like the declaration of incompatibility in the UK have "fallen into desuetude" due to their non-use: "If the aim of these provisions was to give the legislature 'the last word', it is hard not to conclude that they are not working."[732] She has also pointed out the confusion between the descriptive and normative approaches in Gardbaum's work, given that the reader cannot distinguish between what has been the constitutional practice and what belongs to his normative ideal model of weak judicial review. However, her empirical arguments do not harm the relevance of the strong-form/weak-form typology as a way of describing and guiding inter-institutional communication within the practice of judicial review.

The value of the distinction between strong and weak judicial review does not lie in the final say it grants to legislatures or to courts, but in the search for a more adequate interaction between these institutions. The strong-form/weak-form typology comes essentially from the

[727]Ibid, Section 4, Subsection 6.
[728]Aileen Kavanagh, "What's so Weak About 'Weak-Form Review'? A Rejoinder to Steven Gardbaum," International Journal of Constitutional Law 13, no. 4, (2015), 1049–1053, 1049. Kavanagh referred to a previous article on this issue; see also: Aileen Kavanagh, "What's so Weak About 'Weak-Form Review'? The Case of the UK Human Rights Act 1998," International Journal of Constitutional Law 13, no. 4, (2015), 1008-1039.
[729]Kavanagh, A Rejoinder to Steven Gardbaum, 1049.
[730]Ibid.
[731]Aileen Kavanagh, "A Hard Look at the Last Word," Oxford Journal of Legal Studies 35, no. 4, (2015), 825-847.
[732]Ibid, 834.

urge to find new theoretical approaches to judicial review and its complex character in contemporary legal systems. Kavanagh has also pointed out that "we need to move beyond a preoccupation with who has the last word" and "look more closely at the institutional roles of the branches of the government and the ways in which these institutions combine, interact and influence each other when making decisions about rights."[733] Nevertheless, she has not addressed the question of why constitutional lawyers cannot do exactly this by distinguishing between weak and strong judicial review. This distinction aims exactly at the "constitutional division of labor between all three branches of government, where each has a distinct though complementary role to play."[734] By distinguishing between strong and weak review, lawyers are better able to focus on inter-institutional interaction and they do not necessarily need to focus on its final results. Theories like weak judicial review try to place courts in a more adequate position within domestic constitutional orders. Lawyers should no longer ignore the necessity to develop new theories that aim to bring more legitimacy and effectiveness to the practice of judicial review and focus on inter-institutional interaction in order to fulfill this task.

6.2.2. The legitimacy and effectiveness of weak judicial review

Weak judicial review offers many advantages for the interaction between institutions within contemporary constitutional democracies. Within constitutional democracies, courts inevitably have to discuss with other institutions about constitutional rights interpretation. Weak judicial review might be able to put courts in a better position in this dialogue. At the inter-American level, it might also be able to establish more frequent and meaningful communication between inter-American and national authorities. The practice of weak inter-American judicial review could, in the long run, strengthen both the work of the inter-American institutions and the national authorities' commitments to human rights, democracy and the rule of law. This effectiveness makes weak international judicial review appealing as a form of decision-making for the IACtHR.

Weak review is much less problematic than strong-form review with regard to legitimacy issues. The most notable feature of weak judicial review is that it eliminates the most feared consequence of the practice of the strong-form variant, i.e., judicial activism. For Mark

[733]Ibid, 847.
[734]Ibid.

Tushnet: "Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance."[735] This is based on the dialogic character of weak-judicial review. Weak-form review privileges neither judicial nor legislative supremacy. It treats "constitutional interpretations offered by legislatures as normatively equal in weight to those offered by courts."[736] Tushnet has emphasized that "weak-form review purports to promote a real-time dialogue between courts and legislatures."[737] Although he has illustrated this dialogic approach with reference to cases in countries like Canada and South Africa, it was up to Rosalind Dixon to theoretically address the dialogic character of weak review in more general terms.[738]

Dixon has claimed that weak judicial review can help counter inherent *blind spots* and *burdens of inertia* in the ordinary legislative process. For her, "even well-functioning legislative processes are routinely subject to blockages."[739] Courts are, on the one hand, well-positioned to counter these blockages and, on the other hand, not necessarily dependent on strong judicial review for this task. She has claimed that the burdens of inertia and blind spots are not pathologies, but something ordinarily present in normally functioning democracies.[740] Legislative blind spots may happen due to the time-pressured nature of legislative deliberation and the burdens of inertia refer to the ordinary dynamic of legislative bodies that work based on priority- and coalition-driven agendas. Courts are well positioned to cope with these blockages, since they possess the necessary expertise and institutional framework to do so and given that they are entirely "free of direct partisan pressure" when considering particular issues.[741] Furthermore, courts do not necessarily need to rely on strong judicial review to face legislative blind spots and the burdens of inertia. Dixon has argued that, in case of legislative blind spots, "courts will often need simply to draw the attention of legislators to instances of unintended or unnecessary rights infringement, and legislatures will then seek to pass corrective legislation for future cases."[742] In case of burdens of inertia, she has argued that "courts will need either to draw greater media and public attention to an issue, or change the legal default in a way that recasts the effects of burdens of inertia within the legislative process."[743]

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[735]Mark Tushnet, Weak Courts, Strong Rights, 23.
[736]Ibid, 36.
[737]Ibid, 43.
[738]Rosalind Dixon, "The Core Case for Weak-Form Judicial Review," Cardozo Law Review 38, (2017), 2193-2232.
[739]Ibid, 2204.
[740]Ibid, 2205.
[741]Ibid, 2217.
[742]Ibid, 2219.
[743]Ibid.

Tushnet and Dixon's approaches to domestic weak review might sharpen the conception of weak inter-American judicial review. Weak inter-American judicial review might promote more frequent and meaningful interaction between inter-American and national authorities regarding human rights protection by means of legislation. In fact, the introduction of weak review into inter-American jurisprudence seems essential for the progressive enforcement of inter-American human rights law, more specifically with regard to the direct enforcement of socioeconomic rights. This chapter will later address the usefulness of weak review for inter-American socioeconomic rights adjudication. For now, it is worth addressing the type of inter-institutional interaction that decision-making within weak review systems can provide. Weak-form review might bring different institutions together for the task of rights enforcement. This means that the IACtHR can work together with national legislatures, the executive and domestic courts and regard them as allies for the proper enforcement of inter-American human rights law. Even if the judicial review of legislation might cause tension between institutions, weak judicial review does not necessarily lead to inter-institutional conflict within the IAS. There is only one way for the IACtHR to promote this type of inter-institutional interaction within the IAS. The IACtHR may limit the practice of judicial review to what Dixon has referred to as a type of decision-making that is "broad, but non-final in scope."[744] It is worth addressing with more attention this type of decision-making, which is central to the concept of weak judicial review.

For Dixon, the practice of weak judicial review should be "both relatively broad in scope ex ante, and non-final in nature ex post."[745] Gardbaum has also referred to the "judicial non-finality" as a defining feature of weak review systems.[746] These definitions of judicial decision-making relate to how these authors understand weak review as a different relationship between courts and legislatures. For Dixon, the broad scope means that courts are allowed to invalidate statutes if they find it appropriate. The non-final character of judicial review relates to the fact that legislatures may override this judicial decision. She has claimed that weak review depends on "whether legislatures have formal power ex post to override a decision of a court to

[744]Dixon has pointed out that: "Judicial review that is truly narrow in scope may at times be too weak to counter the most powerful legislative blockages; whereas judicial review that is broad but non-final in scope will almost always be sufficient for this purpose." Ibid, 2202.
[745]Ibid, 2203.
[746]Gardbaum, The New Commonwealth Model, 29.

invalidate a particular statute."[747] In these terms, weak judicial review is a "broad but *revisable review*" (my emphasis).[748]

At the domestic level, judicial review necessarily leads to inter-institutional dialogue. Both in its the strong and weak variants, legislatures necessarily have to react to the judicial invalidation of pieces of legislation. This should also apply to the relationship between the IACtHR and national authorities. Weak review relies on a dialogic inter-institutional approach, in which courts refuse to have the final say when reviewing a statute and might accept the final solution adopted by the national legislature. The broad but revisable form of decision-making is particularly useful for the inter-American judicial enforcement of matters that have not been sufficiently addressed by inter-American human rights documents, e.g., socioeconomic rights. This form of decision-making might help inter-American judicial authorities to discuss more with domestic authorities about these matters. By practicing weak judicial review, the IACtHR may even invalidate a domestic statute pertaining to socioeconomic rights but it should later refer the issue to national legislatures so that they can practice the final phase of political rights review. This multi-institutional approach might improve the legitimacy and effectiveness of the direct enforcement of socioeconomic rights, at least under the contemporary form of inter-American human rights law.

Some scholars have argued that socioeconomic rights demand weak judicial review because they are more complex to enforce than civil and political rights. Mark Tushnet has explained that the judicial enforcement of socioeconomic rights must cope with "polycentric problems."[749] He has borrowed this term from Lon Fuller and Kenneth Winston, who claimed that polycentric situations involve many interrelated issues that could challenge the likelihood of judicial enforcement.[750] Tushnet has claimed that socioeconomic rights pose polycentric problems to courts because "they are far less directive" than civil and political rights.[751] For him, they usually "identify a general area of concern and require that the government do something in the area, without initially specifying in much detail what must be done."[752]

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[747]Dixon, The Core Case for Weak-Form Review, 2202.
[748]Ibid, 2203.
[749]See: Mark Tushnet, "The Inadequacy of Judicial Enforcement of Constitutional Rights Provisions to Rectify Economic Inequality, and the Inevitability of the Attempt," Harvard Public Law Working Paper No. 18-25, (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123085.
[750]Lon Fuller, Kenneth I. Winston, "The Forms and Limits of Adjudication," Harvard Law Review 92, no. 2, (1978), 353-409. On this type of polycentricity related to socioeconomic rights judicial enforcement, see also: Jeff King, "Polycentricity," in *Judging Social Rights*, (Cambridge: Cambridge University Press, 2012), 189-210.
[751]Tushnet, The Inadequacy of Judicial Enforcement, 3
[752]Ibid.

Tushnet has referred to socioeconomic rights as polycentric issues when arguing that weak review is the most appropriate way to enforce them judicially. One example is when a court settles a case that involves the claim that the state should cover the costs of expensive medicine based on the constitutional right to health. In order to settle the case, the court is supposed to deal with highly complex material like domestic fiscal policies and their sensitive effects on the enforcement of the right to health. This illustrates how courts do not possess the institutional capability to address many questions involved with the enforcement of socioeconomic rights in a definite way, at least not in the contemporary form of constitutional democracies. Besides being illegitimate, the practice of strong review with regard to socioeconomic rights legislation is barely effective. Courts are, therefore, forced to interact with legislatures, which are the institutions that rule over issues like public spending. Although courts might dare to address polycentric issues, they necessarily need to interact with other institutions when doing so. If they opt for strong judicial review, they might cause inter-institutional conflicts or even risk crossing the limitations of judicial enforcement power. How could courts order public spending when they lack the knowledge of how much state authorities are even able to spend?

Even if legal scholars might doubt this interpretation of the special nature of socioeconomic rights enforcement, it is hard to deny that these rights are far less directive than civil and political rights due to the lack of legislation and jurisprudence regarding them. This is especially true with respect to inter-American human rights law. It is based on this fact that socioeconomic rights might, at least in the contemporary form of inter-American human rights law, demand more inter-institutional interaction. The need for a multi-institutional approach intuitively makes weak judicial review the best option for the IACtHR. This study will return to this argument later under the analysis of the inter-American practice of weak judicial review.

6.2.3. Comparing strong and weak international judicial review

The concepts of strong and weak judicial review are easier to understand when they are compared to each other. The weak form is called dialogic, while the strong form is called authoritative or final. In this section, this study focuses on comparing their international variants. As Basak Çali and Anne Koch have pointed out, international human rights courts

"typically do not have the power to enforce their judgements or to strike out domestic legislation the way their domestic counterparts have."[753] Based on this fact, they have argued that we can make only an analogical use of the distinction between weak and strong review when referring to international human rights adjudication. In line with this, they have distinguished between weak, intermediate and strong international judicial review based on the level of intrusiveness and specialization of the ordered measures and whether the international court follows compliance with the judgement. However, based on the description of weak judicial review in this chapter, it is possible to distinguish between weak and strong international judicial review based on their different modes of inter-institutional interaction within the regional system for human rights protection.

Within weak international judicial review, domestic legislatures may be able to override an international court's decision on a particular statute. In contrast, strong international judicial review might establish final interpretations on the validity of statutes based on international documents. When an international court practices strong judicial review, it does not defer to national authorities' interpretations of the matter. This lends this type of decision-making a final character. Due to this final character, strong international judicial review does not promote debate between the international human rights court and national authorities about the validity of a specific statute. When practicing weak international judicial review, the international court may afford national authorities greater discretion with regard to the general measures that are necessary to solve the human rights violations involved in a case. As we have seen with regard to ECtHR jurisprudence in the last chapter, these general measures can involve amending domestic legislation. However, even if the international court has ordered national authorities to amend domestic legislation to avoid future violations of the convention, the political review of legislation by the national legislature still remains the most important phase.

Strong international judicial review has prompted much debate because it may involve the invalidation of domestic statutes by international courts. This is what the IACtHR has done with regard to amnesty laws within the IAS. The IACtHR has established conventionality control as a means to strike down amnesty laws that had been, according to the court, inappropriately adopted by national authorities within domestic law. This decision was resolutive and it was not supposed to be discussed by national authorities (i.e., courts and the

[753]Başak Çali, Anne Koch, "Explaining Compliance: Lessons from Civil and Political Rights," in *Social Rights Judgements and the Politics of Compliance. Making it Stick*, eds. Malcolm Langford, César Rodríguez-Garavito, Julieta Rossi, (Cambridge et al.: Cambridge University Press, 2017), 43-74, 56.

national legislature). By contrast, weak international judicial review primarily involves the review of the (in-)compatibility of domestic law with international law. Weak international judicial review could be adopted by the IACtHR in order to establish that a given domestic statute is incompatible with inter-American human rights legislation. However, the IACtHR should limit its powers to declaring this incompatibility and refer the statute back to its national legislature. The legislature could then proceed to politically review the statute, taking this judicial decision as a meaningful reference point.

Both forms of international judicial review also differ in their aims. International authorities may praise the consistency of existing international legislation and jurisprudence by practicing strong judicial review of domestic law. Weak judicial review, in contrast, might create more interaction between institutions when debating legislation. Authorities may opt for dialogue because they do not have a final solution for the disputed issue. This relates to what Tushnet has described as the experimentalist character of weak judicial review, i.e., that it "may be appropriate when genuine uncertainty exists in the relevant community about what some constitutional provision really means."[754] While strong review might emphasize the authority of existent legislation and jurisprudence as a way of reaffirming them as the right answer when discussing a specific statute, weak judicial review might seek new solutions with regard to a piece of legislation.

Strong review should, at least in principle, have a limited scope, while the weak variant can adopt a broader scope. The limited scope of strong review is based on the fact that courts have to make narrow decisions. An authoritative judicial attitude usually demands that courts be specific in what exactly they want with regard to a statute. To do so, they necessarily have to limit the scope of judicial review, at least if they want authorities to comply with the decision. Within weak judicial review, in contrast, courts may address burdens of inertia and blind spots of legislation in a specific way, but they do not necessarily need to limit its scope to specific issues. International courts may declare statutes incompatible with an international convention and refer the issue to the domestic legislature for it to adopt further necessary measures. This does not mean that weak judicial review is vague, it just means that international authorities might dare to address more general issues and point to inconsistencies that can be more concretely addressed later by domestic legislatures.

[754]Tushnet, Weak Courts, Strong Rights, 66-67.

It is worth underscoring that broad-scope weak international judicial review enables the IACtHR to address the blind spots of domestic legislation and the burdens of inertia of national legislatures. Beyond declaring that a domestic statute is incompatible with the ACHR, the IACtHR can notify national legislators of these ordinary legislative pathologies and demand that they, in a reasonable time frame, amend legislation in order to comply with the inter-American human rights regime on the disputed matters. In contrast to Çali and Koch's typology of international judicial review, nothings stands in the way of the IACtHR closely monitoring compliance with a given judgement when practicing weak international judicial review. In fact, if weak international judicial review intends to promote more inter-institutional interaction within the IAS, monitoring compliance is the most effective way of maintaining dialogue between these institutions for a longer period until new legislation is adopted by national legislatures.

A last comparative issue relates to the usefulness of judicial review. Strong international review might be more effective for the pieces of legislation relating to civil and political rights, while weak-form review seems to be more effective for reviewing legislation on socioeconomic rights. As this study has already explained, this is not related to the programmatic character of socioeconomic rights, but it is related to the challenge that these rights pose to legislatures and courts. This argument is mainly based on the late introduction of socioeconomic rights into legislation and jurisprudence at the national and international levels. Lawmakers and courts have much more experience with legislation on and enforcement of civil and political rights than they have with socioeconomic rights. Due to the greater difficulties of enforcing socioeconomic rights, international courts should limit their authority to the weak judicial review of domestic legislation pertaining to these rights. By doing so, judicial decision-making becomes more legitimate, since the lack of legislation and precedents on these rights inevitably leads to the practice of judicial activism. Moreover, weak international judicial review can make socioeconomic rights adjudication more effective because it engages other institutions like national legislatures on the interpretation and enforcement of these rights. This is particularly useful for the direct enforcement of socioeconomic rights within inter-American human rights jurisprudence.

6.2.4. The unavoidable allocation problems of mixed-form judicial review

The mixed-form theory of judicial review shares the concern of some constitutional lawyers regarding the issue that some legal systems might not offer the best form of the inter-institutional interaction brought about by the practice of judicial review. Mattias Kumm, for instance, has pointed out that *super-weak* or *super-strong* systems are not appropriate forms of judicial review institutionalization.[755] He has argued that some weak systems, like the UK's, might not provide the best form of institutional relationship between courts and legislatures, given that courts cannot provide the minimal remedy of declaring legislation illegal or not applicable to the claimant.[756] For him, judicial review systems like the system in the UK are too weak. On the other hand, the US system of judicial review also does not offer the best institutional alternative, given that the "decisions by the Supreme Court are extremely hard to overturn and judges have an inappropriately central role to play in the overall constitutional process."[757] This system is arguably too strong.

Kumm has claimed that if the system is too weak, constitutional lawyers must address the problems involved in electoral authoritarianism; in a super-strong system, they must address the problems associated with juristocracy.[758] In line with this, he has advocated for reforms of judicial review systems "towards appropriately institutionalizing contestatory rights against legislative majorities, while avoiding the pitfalls of juristocracy."[759] However, similar to Aileen Kavanagh, Kumm has described the conventional distinction between weak and strong review as irrelevant for addressing the most problematic issues regarding the institutionalization of judicial review in contemporary liberal democracies.[760]

This study has already explained why these categories of weak and strong review might be useful for lawyers seeking the most appropriate form of inter-institutional relationship between courts and legislatures. When applied to inter-American human rights jurisprudence,

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[755]Mattias Kumm, "Constitutional Courts and Legislatures. Institutional Terms of Engagement," Católica Law Review 2, no. 1, (2017), 55-66.
[756]Given this fact, Kumm has affirmed that the UK system "raises concerns that disqualifies it as an appropriate institutionalization of citizens contestatory rights." Ibid, 64.
[757]Ibid. This central role is due to factors like the burdensome regulation of constitutional amendments in the US and the life tenure of Supreme Court judges. For Kumm, these factors have formed the "distinctively juristocratic institutionalization of judicial power in the US." Ibid, 65.
[758]"In the US the institutional position of the Supreme Court is too strong in its relationship with the legislature, effectively enabling juristocracy. In the UK the position of the courts is too weak, effectively enabling electoral authoritarianism." Ibid, 57.
[759]Ibid, 66.
[760]Ibid.

these categories offer another advantage: they can become a pedagogical instrument that is able to change the legal culture of international human rights judicial enforcement in Latin America. Distinguishing between strong and weak judicial review enables legal scholars to outline ways in which these systems can meet halfway. Moreover, this distinction can serve as a pedagogical tool to change a legal culture of human rights enforcement that has mostly been used to practice strong international judicial review in cases of conflicts between domestic and international human rights norms. In line with this argument, mixed-form judicial review embodies the normative ideal of inter-institutional interaction between the IACtHR and domestic authorities within the IAS.

It is true that judicial review systems around the globe present much more complex elements than the categories of strong and weak systems are able to describe. It is also largely true that several important factors play an essential role in the appropriate institutionalization of judicial review. However, it is debatable whether these different categories cannot be used to change the legal culture of the institutional terms of engagement between domestic and international human rights authorities. In a nutshell, changing the legal culture of dependency on strong-form inter-American judicial review is the most salient reason for describing the most salient features of weak judicial review and for introducing it into inter-American jurisprudence. This gives rise to a major problem that mixed-form theory has to address, as this study explains in the following.

Every theory of blended-form judicial review must deal with what Mark Tushnet has called problems with allocation, i.e., determining when strong review is most adequate or when weak review is the best option for courts.[761] Due to this major obstacle, he has argued that the best option for legal scholars is to opt for a general theory of weak judicial review within domestic constitutional orders.[762] Based on Tushnet's analysis, a general theory of weak international judicial review could arguably be useful for the IACtHR as well. Addressing human rights systems in general, Richard Bellamy has also argued that the authority of

[761]Mark Tushnet has noted the difficulty of mixed-form theories: "Perhaps there could be strong-form review with respect to some constitutional issues, weak form review with respect to others. (…) The first problem with such a strategy is figuring out the basis for allocating issues to one mode of review rather than the other. (…) developing criteria for allocating issues to weak- and strong-form review (…) is particularly difficult." Tushnet, Weak Courts, Strong Rights, 36.

[762]Tushnet has addressed this issue: "A final question is whether weak-form review can – or should – be confined to the enforcement of social and economic rights. Is it an institution well designed to enforce first-generation rights such as free expression and equality in political participation? (…) weak-form systems of judicial review – if they can be stably sustained – may indeed be the best institutional mechanism for enforcing *all* fundamental rights, first-, second-, and third-generation" (emphasis in the original); Ibid, 228.

international human rights courts should be restricted to weak review in order to ensure that regional systems gain more democratic legitimacy.[763] For him, the democratic features of constitutional orders can be useful for holding adjudication accountable. Given that law may fall prey to arbitrary decisions and reflect only the views of particular groups with privileged access to the legal system, the legitimacy of the judicial decisions should rest on their concurrence with democratically established interpretations.

International human rights courts would be compatible with Bellamy's political constitutionalism if they only practice weak review,[764] which allows the international system of human rights protection to be subjected to democratic political control within domestic legislative processes.[765] The principles of Bellamy's political constitutionalism lead to an institutional model for regional human rights systems based on a "two-level political constitution."[766] Within this model, "the voluntary and fair association among democratic states" translates into "a political constitution at the international level," which renders decisions by the regional court and commission "subject to the democratic authorization and accountability of the representatives of the contracting democratic states, who are in their turn democratically authorized and accountable to those they represent through a political constitution at the domestic level."[767] For Bellamy, this two-level model could solve the legitimacy problem between the domestic and the international levels within a regional system of human rights protection.

What Tushnet has proposed for domestic constitutional orders and Bellamy for regional systems, i.e., restricting rights adjudication to the practice of weak review, might not be the best option for the IACtHR for a number of reasons. First, the difficulties Tushnet has mentioned with regard to allocation issues might be addressed in a principled way based on the evolution of inter-American human rights law. Second, and more related to Bellamy's argument, adopting weak review as the only form of inter-American judicial review could have severe

[763]Richard Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights," European Journal of International Law 25, no. 4, (2015), 1019-1042.
[764]"If [*International human rights courts*] are to respect the integrity of the democratic process, particularly in their judgements on domestic legislation and policies, they must be restricted to weak review." Ibid, 1034.
[765]Bellamy has argued that: "If the legitimacy of democratic states stems from them offering reasonably effective mechanisms for the identification and equal advancement of the interests of their citizens, then the legitimacy of international system stems from them doing likewise through being in their turn under the shared and equal control of the signatory states." Ibid,1033.
[766]Ibid.
[767]Ibid.

consequences for human rights enforcement in Latin America. As the initial parts of this chapter have explained, state-perpetrated authoritarian practices and the systematic underenforcement of socioeconomic rights are among the most prominent features of the Latin American human rights enforcement context. For this reason, the IACtHR should not become an accomplice to these systematic state-perpetrated human rights violations. Limiting international human rights jurisprudence to the practice of weak judicial review would certainly put the IACtHR in this position.

Tushnet is right when he affirms that problems with allocation are central to blended-form theories of judicial review. Moreover, as this study has concluded in the last chapter, theories of judicial review should adopt a context-based approach. It is not possible to propose a theory of international human rights adjudication without considering the evolution of human rights legislation and practice in a particular context. In line with this, this study will now address the legitimacy and effectiveness of the strong and of the weak variants of judicial review based on the Latin American human rights enforcement context. Within this context, it is plausible to limit the practice of strong inter-American judicial review to flagrant violations of inter-American human rights law on civil and political rights. In contrast, the traditional absence of inter-American legislation and case law on socioeconomic rights leads us to the argument that the IACtHR should practice weak inter-American judicial review in cases involving these rights.

6.3. Inter-American judicial review allocation

6.3.1. Strong inter-American judicial review

One major problem with the practice of strong inter-American judicial review is the misconception that it will necessarily lead to backlash within the IAS. Backlash may range from domestic opposition to inter-American reports and decisions to even more drastic scenarios, such as the withdrawal from inter-American treaties or retreat from regional organizational membership. The threat of backlash has always been a sensitive topic for international courts, whose proper existence relies on state membership and compliance. Massive retreat from regional organizational membership would certainly not strengthen the legitimacy and

effectiveness of any regional system. Due to its relevance to the practice of inter-American strong judicial review, the fear of backlash will be briefly addressed in the following.

The threat of backlash followed the evolution of human rights enforcement in Latin America since its beginnings. The Argentinian's government threatened to leave the OAS due to a 1979 IACHR report on serious human rights violations in that country.[768] More recently, the most substantial examples of resistance to the IAS were the retreat from regional membership by Trinidad and Tobago and Venezuela.[769] Despite these examples in the IAS's history, the fear of backlash should not be used as a strong argument for the IACtHR to limit the enforcement of inter-American human rights law to the practice of weak international judicial review.

According to Wayne Sandholtz, Yining Bei and Kayla Caldwell, backlash is more likely to occur when the perceived costs of membership are rising while the perceived benefits are declining.[770] States usually balance these costs and benefits of membership and it is difficult to know which factors might figure as positive or negative. For authoritarian regimes, for instance, the appropriate enforcement of inter-American human rights law might have a negative impact and there is not so much that inter-American authorities can do to change this perception. In the two cases of retreat from the IAS, inter-American institutions would not have been able to keep those countries inside the system without compromising the integrity of inter-American human rights law. Trinidad and Tobago left the IAS due to the disagreement around the new regulation of the death penalty within the IAS. This new regulation of the death penalty was established based on an inter-American protocol on the matter, which was signed and ratified by the majority of the IAS member states. Venezuela, as this chapter has already mentioned, has regarded the inter-American institutions as enemies of its domestic authoritarian policies and even opted to leave the OAS based on this biased attitude.

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[768]"The Commission's report on Argentina precipitated a major crisis in the OAS. It was considered by the General Assembly of the OAS, meeting in Washington in November 1980. The report was highly critical of the Argentine Government and the United States proposed a resolution condemning the violations of human rights in that country. Argentina threatened to leave the Organization if this was adopted, and was supported by Bolivia, Chile, Paraguay and Uruguay," A.H. Robertson, J. G. Merrils, Human Rights in the World. An Introduction to the Study of the International Protection of Human Rights, 4th ed., (Manchester, New York: Manchester University Press, 1996), 208.

[769]Trinidad and Tobago withdrew from the IAS in 1998, Venezuela in 2012.

[770]Wayne Sandholtz, Yining Bei and Kayla Caldwell, "Backlash and International Human Rights Courts," in *Contracting Human Rights. Crisis, Accountability and Opportunity*, eds. Alison Brysk, Michael Stohl, (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2018), 159-178.

If backlash should not represent a meaningful counter-argument, the consequent question is what should guide the practice of strong inter-American judicial review. Strong judicial review greatly affects the multilevel inter-institutional interaction within the IAS. It represents the empowerment of the IACtHR at the expense of both national legislative authorities and the most authoritative domestic courts, which were previously the only institutions responsible for amending domestic legislation. When addressing the institutionalization of judicial review at the domestic level, Mattias Kumm has questioned which circumstances could justify the empowerment of a constitutional court to invalidate even constitutional norms, as it has been the case in Germany.[771] Similarly to this domestic debate, there has also to be conditions and justifications for an international human rights court to practice strong judicial review.

Chapter IV has explained how the justification for strengthening international institutions relate to the rise of global constitutionalism within constitutional law scholarship. Before addressing how global constitutionalism applies to the specific context of human rights practice in Latin America, it is worth remembering what has been said about constitutional lawyers' turn to global constitutionalism in that chapter. The turn to global constitutionalism has arisen due to some constitutional lawyers' skepticism about the idea that domestic constitutional norms could alone guarantee the legitimate exercise of public authority. International law is arguably necessary so that the protection of rights at the international level does not leave individuals to the mercy of constitutional norms drafters and interpreters.[772] Strengthening international institutions should be every national government's duty in face of the "failures and risks of the sovereign-state system,"[773] at least in the contemporary form of the international legal order. This duty is arguably "the most general structural principle and interpretative background of international law."[774]

How does this structural principle of international law according to global constitutionalism apply to the relationship between Latin American countries and the inter-American institutions for human rights protection? Domestic governments have traditionally presented many challenges to the consistent evolution of democracy, the rule of law, and human

[771]Mattias Kumm, "Constitutional Courts and Legislatures. Institutional Terms of Engagement," Católica Law Review 2, no. 1, (2017), 64-65.
[772]Alon Harel, Why Law Matters (Oxford: Oxford University Press, 2014), 185-190.
[773]Ronald Dworkin, "A New Philosophy for International Law," Philosophy & Public Affairs 41, no. 1, (2013), 2-30, 19.
[774]Ibid.

rights protection in the region. The most recent Latin American wave of democratization in the late 1980s changed the relationship between the domestic and international institutions within the IAS. As we have seen in Chapter I, democratization was one of the factors responsible for the emergence of cosmopolitan constitutionalism in Latin American constitutional law. The last few decades have seen the empowerment of the inter-American human rights institutions from the bottom-up. National institutions have gradually afforded greater authority to the regional commission and the regional court within domestic law. This bottom-up empowerment of inter-American institutions has, in fact, been in accordance with the structural principle of international law according to global constitutionalism. However, this last democratization process no longer seems capable of guaranteeing the appropriate evolution of human rights protection in some Latin American countries.

As the present chapter has already explained, the region is now witnessing a new wave of authoritarianism, which has involved serious human rights violations in some countries, like Venezuela and Nicaragua. One way out of this vicious cycle of authoritarianism is arguably to empower international institutions like the inter-American human rights institutions. Given that authoritarian countries will not keep on empowering these institutions through the bottom-up relationship,[775] the IACtHR should be allowed to retain its strong powers against authoritarian legislation by practicing strong international judicial review. The inter-American institutions should not passively stand by as human rights protection is eroded in Latin American countries. They should not leave individuals to the mercy of authoritarian governments, which are currently among the drafters and interpreters of some Latin American constitutions.

As Chapter IV has also generally explained, the IACtHR has the potential to serve as a control body against the adoption of authoritarian legislation in Latin American countries. Authoritarian governments typically change the constitutional order in order to subvert the rule of law to their political endeavors. Unsurprisingly, many of these political endeavors go against the established interpretations of the international conventions on human rights. In fact, how could authoritarian governments justify that the political intimidation of the opposition does not go against any reasonable interpretation of the ACHR provisions, most of them regarding the protection of civil and political rights? They simply cannot offer this justification; this is

[775]A good question is whether domestic courts could continue interacting with international human rights authorities despite the rule of an authoritarian government. Given that authoritarian rulers in Latin American countries have frequently interfered with the separation of powers, it seems implausible that courts could do it.

why Latin American authoritarian governments have commonly opposed the work of international human rights institutions.

However, the defining question here is not what the IACtHR is supposed to do as a control body against domestic authoritarianism but how the court should fulfill this task without transforming human rights protection within the IAS into a type of international juristocracy. If the state-perpetrated authoritarian practices can justify the practice of strong inter-American judicial review, the *political and legal outcomes* of the multilevel inter-institutional interaction should guide this strong review within inter-American human rights jurisprudence. There are two basic principles that can guide the work of the different institutions involved in the practice of strong inter-American judicial review: the principle of the dignity of inter-American legislation and the principle of salience. The first relates primarily to the legitimacy of strong inter-American judicial review, while the second relates to guaranteeing its effectiveness within domestic law.

The evolution of inter-American human rights legislation is arguably the first prominent outcome of the multilevel inter-institutional interaction within the IAS. Based on this, inter-American legislation should guide the practice of strong inter-American judicial review. Due to the evolutive character of inter-American human rights legislation over time, the IACtHR might be able to limit the practice of strong judicial review to cases involving *flagrant* violations of civil and political rights. This greater attention to inter-American human rights legislation relates to what Jeremy Waldron has called "the dignity of legislation,"[776] i.e., presenting legislation as a "dignified form of governance and a respectable source of law."[777] His argument helps us to understand how inter-American legislation is able to provide a legal basis for the practice strong inter-American judicial review.

Waldron has called attention to the fact that jurisprudential approaches frequently ignore the value of legislation as a democratic source of law and tend to focus on what courts do.[778] He has intended to change how legal scholars perceive legislation because he opposes the practice of judicial review within domestic law. However, when applied to the relationship

[776]This argument can be found in: Jeremy Waldron, The Dignity of Legislation, (Cambridge: Cambridge University Press, 1999). It can also be found in: Jeremy Waldron, Law and Disagreement, (Oxford: Oxford University Press, 1999), 19-146.
[777]Waldron, The Dignity of Legislation, 2
[778]For him, jurisprudence usually "presents ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barreling – as anything, indeed, except principled political decision-making." Ibid.

between domestic and inter-American human rights authorities, the principle of the dignity of legislation might have an opposite effect, i.e., it can justify the practice of strong inter-American judicial review. In this case, inter-American human rights legislation might serve as a legal basis for the practice of strong judicial review of inconsistent domestic legislation.

Due to the legislative character of human rights treaties,[779] the principle of the dignity of legislation should also apply to inter-American human rights law. When addressing the practice of judicial review within domestic law, Waldron himself has claimed that "it may still be the case that judicial review is necessary as a protective measure against legislative pathologies"[780] and that there are cases "in which judicial review might be deemed appropriate as an anomalous provision to deal with special pathologies."[781] The pathology within the relationship between national and inter-American authorities consists in the fact that the national authorities, especially under the rule of authoritarian governments, systematically violate inter-American human rights law, despite having ratified it within the procedures established for IAS member states.

Latin American countries have been opportunistic ratifiers of international human rights legislation.[782] This opportunistic attitude justifies the practice of strong inter-American judicial review, especially with regard to those ACHR provisions that have been devoted greater attention in specific inter-American conventions, treaties, and protocols. It is the proper evolution of inter-American human rights legislation that can reveal when domestic authorities are *flagrantly* violating inter-American human rights law. The practice of strong review should therefore be directly based on inter-American legislation that was ratified by the national authorities. When practicing strong inter-American judicial review, the IACtHR should consistently refer to the inter-American documents that justify this greater intrusiveness of

[779]Samantha Besson has addressed the legislative dimensions of human rights treaties; see: Samantha Besson, "Sources of International Human Rights Law. How General is General International Law?," in *The Oxford Handbook on the Sources of International Law*, eds. Samantha Besson, Jean D'Aspremont, (Oxford: Oxford University Press, 2017), 837-870, 846-847.
[780]Jeremy Waldron, "The Core of the Case Against Judicial Review," Yale Law Journal 115, (2006), 1346-1406, 1356. Waldron referred especially to "pathologies relating to sex, race, or religion in particular countries." Ibid.
[781]Ibid, 1359.
[782]Beth Simmons has distinguished between sincere, negative and opportunistic ratifiers of international treaties. See these different categories in: Beth Simmons, "Theories of Commitment," in *Mobilizing for Human Rights. International Law in Domestic Politics*, (New York: Cambridge University Press, 2009), 57-111. The opportunistic ratifiers simply go with the crowd in order to avoid criticism from their peers within a specific international system: "They may ratify for relatively immediate diplomatic rewards, to avoid criticism, or to ingratiate themselves with domestic groups or international audiences." Ibid, 58.

remedies within international human rights jurisprudence. By doing so, the IACtHR can strengthen the legitimacy of the practice of strong review of domestic law within the IAS.

If inter-American human rights legislation is able to legitimize the practice of strong inter-American judicial review of domestic laws, then it probably merits more attention from us. The development in inter-American human rights legislation has focused on the protection of civil and political rights. These rights are the protagonists of the ACHR, which only indirectly relates to socioeconomic rights. Civil and political rights are also the subject of the majority of the inter-American conventions that have been adopted and ratified by the IAS member states. Inter-American documents focusing on the protection of civil and political rights include the inter-American conventions: i) on Extradition (1981), ii) to Prevent and Punish Torture (1985), iii) the Protocol to Abolish the Death Penalty (1990), iv) the convention on the Prevention, Punishment and Eradication of Violence against Women (1994), v) on the Forced Disappearance of Persons (1994), vi) on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999), vii) against Racism, Racial Discrimination and Related Forms of Intolerance (2013); and, finally, the convention viii) against All Forms of Discrimination and Intolerance (2013).

Beyond these documents, in 2001 the OAS adopted the Inter-American Democratic Charter, which established that democracy is a right of the peoples of the Americas and that governments have an obligation to promote and defend it.[783] Among essential elements of representative democracy the charter included "the holding of periodic, free and fair elections based on secret balloting and universal suffrage," together with "the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."[784] The charter also established the possibility of a suspension from the participation in the OAS in case of "an unconstitutional interruption of the democratic order of a member state."[785] The inter-American focus on the protection of civil and political rights can also be observed in the creation of Special Rapporteurships by the regional commission (IACHR). Most of these special authorities are involved with the protection of civil and political rights. They include the IACHR Special Rapporteurships: on the Rights of Indigenous Peoples (1990), on the Rights of Women (1994), on the Rights of Migrants (1996), for Freedom of Expression (1997), on Human Rights Defenders (2001), on the Rights of Persons Deprived of

[783]Inter-American Democratic Charter, art. 1.
[784]Ibid, art. 3.
[785]Ibid, art. 21.

Liberty (2004), on the Rights of Afro-Descendants and Against Racial Discrimination (2005); and, finally, on the Rights of Lesbian, Gay, Trans, Bisexual , and Intersex Persons (2011).

This major concern with the protection of civil and political rights has also had consequences for the evolution of inter-American human rights jurisprudence. As Chapter III has explained, the IACtHR initially focused on the enforcement of civil and political rights after the establishment of new democracies in the region. This period of inter-American jurisprudence has been described as the transitional justice phase, which later was replaced by the contemporary phase of transformative justice. During the transitional justice phase, the IACtHR established conventionality control as a form of strong inter-American judicial review of domestic legislation, which, according to the court, involved violations of the civil and political rights within the ACHR.

Yet, there is a remaining apparent contradiction with this argument for the strong authority of inter-American human rights legislation. When conventionality control was established by the IACtHR, it was not mentioned by any inter-American human rights document. In contrast to domestic judicial review, which is now established in different ways by domestic constitutions, conventionality control is still not mentioned by any inter-American treaty. This is the most salient reason why it has been called an example of the IACtHR's judicial activism. How is it possible to reconcile the respect for the dignity of inter-American legislation with the emergence of strong-form inter-American judicial review? The answer to this question relates to the evolution of Latin American cosmopolitan constitutionalism according to what Dworkin called the principle of salience.

Dworkin claimed that every state, as a coercive system, should seek to improve its political legitimacy within the international order.[786] He also noted that there are several ways for states to do this. Given the range of alternatives available, how is it possible to find a normative guide for state action in the international system? His answer to this question was the principle of salience. According to it, "if a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well."[787] He added that "this duty holds only if a more general practice to that effect,

[786]Dworkin, A New Philosophy for International Law.
[787]Ibid, 19.

expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole."[788]

In international law scholarship, Dworkin's principle of salience calls attention to legal sources relating to customary international law. For the present study, this type of relationship between customary law and international human rights law is of great relevance. Samantha Besson has explained that legal scholars have been proposing "softer understandings of custom" within international law scholarship due to more recent factors like the consolidation of international institutions.[789] The principle of salience illustrates this softer understanding of customary international law, given that it loosens the two-element approach based on the elements of *consuetudo* and *opinio juris*.[790] By doing so, the principle of salience gives customary international law a more dynamic character, which is arguably appropriate based on the increasing complexity of international law. In fact, customary inter-state and intrastate practices might represent increasingly important sources of international human rights law. This is especially true with regard to practices within regional systems of human rights protection.

As Besson has also explained with regard to regional customary law: "[w]hile those regional customs may not yet present together the degree of universality one would expect of international human rights law," many elements in the transnational consolidation of human rights law have "first occurred at intermediary regional levels before being universalized further through international human rights courts and bodies."[791] In line with this, scholars should not ignore elements of regional customary law. Based on this approach, it is worth explaining how strong inter-American judicial review abides by the principle of salience as applied to the regional level of human rights practices in Latin America. The two most decisive questions regarding this issue are: Could the practice of conventionality control of domestic norms that violate inter-American human rights law represent an appropriate means for state authorities to fulfill the general obligation of improving the legitimacy of Latin American governments in the international order? Is the adoption of conventionality control, in turn, consistent with the principle of salience? Both questions can be answered in the affirmative based on the evolution of Latin American cosmopolitan constitutionalism.

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[788]Ibid.
[789]Samantha Besson, "Sources of International Human Rights Law. How General is General International Law?," in *The Oxford Handbook on the Sources of International Law*, eds. Samantha Besson, Jean D'Aspremont, (Oxford: Oxford University Press, 2017), 837-870, 857.
[790]Ibid, 858.
[791]Ibid, 865.

The practice of strong inter-American judicial review might help Latin American state authorities to improve the political legitimacy of domestic governments, especially given that authoritarianism represents a recurrent threat to proper human rights enforcement within domestic law in the region. After democratization, these governments ratified international documents that mostly involve the protection of civil and political rights and, therefore, they should enforce these international rules. Conventionality control demands that national authorities pay close attention to these political commitments and guarantee the effectiveness of inter-American human rights law within domestic law. The establishment of conventionality control by the IACtHR represents a viable way to improve the legitimacy of Latin American states. The practice of conventionality control of inconsistent domestic laws sends the appropriate message that Latin American countries, most of which have had frequent episodes of authoritarian governments throughout their history, now care about enforcing civil and political rights in a consistent way.

The innovative character of conventionality control should no longer be interpreted as an example of inter-American judicial activism. In fact, conventionality control has become the most salient example of how Latin American countries might improve the legitimacy of domestic governments and ensure the effectiveness of inter-American law within domestic law. Conventionality control was certainly an audacious step taken by the IACtHR. However, the establishment of judicial review at the domestic level was also the product of judicial audacity. Over time, this audacious attitude has found an appropriate place within domestic constitutional orders. Even legal scholars who oppose the practice of domestic judicial review admit that it became a defining feature of contemporary constitutional democracies. Dworkin claimed that judicial review might represent a viable means to improve the legitimacy of coercive authority at the domestic level. This study argues that the same applies to conventionality control with regard to the Latin American countries under the authority of the inter-American institutions.

As Dworkin explained, the principle of salience is a mechanism that selects among the available alternatives to strengthen the legitimacy of coercive governments. According to this principle, conventionality control should be adopted by "a significant number of states, encompassing a significant population."[792] Has conventionality control become a salient form of Latin American states improving the legitimacy of the exercise of public authority? Some

[792]Dworkin, A New Philosophy for International Law, 19.

scholars have given a negative answer to this question. Laurence Burgorgue-Larsen, for instance, has claimed that the implementation of conventionality control by domestic authorities has been inconsistent.[793] This could be an argument for the incompatibility of conventionality control and the principle of salience. However, the evolution of Latin American cosmopolitan constitutionalism attests to the successful adoption of conventionality control by Latin American states and demonstrates how it has been consistent with the principle of salience.

Conventionality control has had important consequences for legal practice in Latin America. According to Pablo González-Domínguez, the IACtHR practiced conventionality control "in more than 25 contentious cases and in three Advisory Opinions since 2006."[794] Beyond this, conventionality control has been present in several decisions made by the most authoritative national courts,[795] and it is discussed in several books and academic articles about human rights enforcement in Latin America. This is evidence that conventionality control has become an important feature of legal practice and scholarship at both the inter-American and domestic levels of rights enforcement. Even Burgorgue-Larsen has admitted that "nowadays, all jurists (be they experts in constitutional, criminal or civil law) observe what appears to have been a *genuine constitutional 'big bang';*" (my emphasis).[796] Even if it is true that many IACtHR's decisions may not be enforced within domestic law, which reflects a sad reality for all international courts, the establishment and evolution of conventionality control can be described as a successful example of international human rights adjudication. Most importantly, the domestic and inter-American practices of conventionality control have given rise to a common intrastate practice of human rights enforcement in Latin America. This common practice within the IAS is, according to customary human rights law, the second source of legitimacy for practicing strong inter-American judicial review.

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[793]Laurence Burgorgue-Larsen, "Chronicle of a Fashionable Theory in Latin America. Decoding the Doctrinal Discourse on Conventionality Control," in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, eds. Yves Haeck, Owaldo Ruiz-Chiriboga, Clara Burbano-Herrera, (Cambridge: Intersentia, 2015), 661-663.

[794]Pablo González-Dominguez, The Doctrine of Conventionality Control. Between Uniformity and Legal Pluralism in the inter-American Human Rights System, (Cambridge: Intersentia, 2018), 3.

[795]It is worth remembering the recent decision of the Chilean Supreme Court that confirmed the IACtHR's authority to practice conventionality control: Supreme Court of Chile, (Judgement) May 16, 2019, Case of *AD 1386-2014*. On the importance of this judgement, see: Jorge Contesse, "The Supreme Court of Chile as an inter-American Tribunal," International Journal of Constitutional Law Blog, May 31, 2019, http://www.iconnectblog.com/2019/05/thesupreme-court-of-chile-as-an-inter-american-tribunal.

[796]Laurence Burgorgue-Larsen, Chronicle of a Fashionable Theory in Latin America, 663.

Finally, it is worth addressing one last issue, namely the issue of which cases could concretely lead to the practice of strong inter-American judicial review of domestic law. To answer this question, it is useful to observe how conventionality control has been implemented within the IAS. Conventionality control was practiced by the IACtHR in different cases, all of them involving violations of civil and political rights. Since 2006, the IACtHR has consistently established the state authorities' duty to practice conventionality control with regard to violations of civil and political rights. Beyond the amnesty law cases,[797] conventionality control involved issues like the death penalty,[798] enforced disappearances,[799] extrajudicial executions,[800] and torture.[801] This evolution and implementation of inter-American jurisprudence should serve as an important reference point for the further practice of strong inter-American judicial review. Yet, it is still necessary to refine this argument for restricting the practice of strong review to pieces of legislation that violate civil and political rights. In line with this, the concrete form of strong inter-American judicial review should be the conventionality control of legislation that *flagrantly* violates inter-American legislation and jurisprudence on civil and political rights. Even though this formulation is still abstract, there is one immediately evident consequence: It excludes the practice of strong review of domestic legislation based on violations of Art. 26 ACHR. This is based on the fact that international strong review of domestic legislation on socioeconomic rights is not appropriate for the current stage of inter-American human rights law. Strong-form review should be used to bring more consistency to human rights enforcement in Latin America. Yet, this consistency is still far from being reached with regard to socioeconomic rights legislation and jurisprudence, as this study will explain in the following section.

Beyond this first consequence, it is difficult to try to settle specific criteria for the practice of strong inter-American judicial review of domestic law given that this practice is intended to adopt a dynamic character within inter-American human rights jurisprudence. Even a general analysis cannot replace a case-by-case approach with specific references to inter-American human rights legislation and precedents. Nevertheless, it is worth giving examples

[797]The cases of *Barrios v. Peru*, *La Cantuta v. Peru*, *Almonacid Arellano et al v. Chile*, *Gelman v. Uruguay*, *Gomes Lund v. Brazil* and *Herzog v. Brazil* will be addressed in greater detail in the following chapter.
[798]IACtHR, (Judgement) November 20, 2007, Case of *Boyce et al v. Barbados*.
[799]IACtHR, (Judgement) August 12, 2008, Case of *Heliodoro Portugal v. Panama*; IACtHR (Judgement) November 23, 2009, Case of *Radilla Pacheco v. Mexico*; IACtHR (Judgement) September 1, 2010, Case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia*; IACtHR (Judgement) August 19, 2013, Case of *Gudiel Alvarez et al. ('Diario Militar') v. Guatemala*.
[800]IACtHR, (Judgement) May 26, 2010, Case of *Cepeda Vargas v. Colombia*; IACtHR (Judgement) November 30, 2012, Case of *Santo Domingo Massacre v. Colombia*.
[801]IACtHR, (Judgement) November 26, 2010, Case of *Cabrera Garcia and Montiel Flores v. Mexico*.

of appropriate and inappropriate uses of strong-form inter-American judicial review before pointing out further important elements of its practice. One appropriate use of conventionality control can be found in *Boyce et al v. Barbados*.[802] In this case, the IACtHR addressed violations of the ACHR due to the sentencing of four people to death based on a domestic statute that prescribes a mandatory sentence of death for persons convicted of the crime of murder. The IACtHR acknowledged that capital punishment was not prohibited by the ACHR, but it was subject to limits in the terms of Art. 4 ACHR. For the IACtHR, the application of mandatory capital punishment within domestic law as occurred in this case was against the ACHR since it was arbitrary and not restricted to the most serious crimes.[803] The IACtHR found a violation of Art. 2 ACHR due to the existence of domestic legislation that restricts the human rights protected by the ACHR. Therefore, the IACtHR established state authorities' duty to practice the conventionality control of the domestic statue due to its incompatibility with inter-American human rights law.[804] For the IACtHR, state authorities should amend domestic law and "ensure that the imposition of the death penalty does not contravene the rights and freedoms guaranteed under the Convention."[805]

In this case, the appropriate use of conventionality control can be determined based on the consistent references to inter-American legislation and jurisprudence. The IACtHR referred to the ACHR provisions on capital punishment and to precedent decisions of similar violations by Trinidad and Tobago. In a more recent case involving Barbados, namely *Dacosta Cadogan v. Barbados*,[806] the IACtHR once again established a violation of Art. 2 ACHR due to the incompatibility between domestic law and inter-American human rights law and ordered national authorities to amend specific pieces of domestic legislation. By consistently referring to legislation and jurisprudence, the court has demonstrated that there are sufficient elements within inter-American human rights law that justify the strong review of domestic legislation in this specific case.

Another case group in which the practice of conventionality control was appropriate relates to the duty of appropriately describing the crime of enforced disappearance within domestic law. In *Heliodoro Portugal v. Panamá*,[807] the IACtHR found a violation of Art. 2

[802]IACtHR, (Judgement) November 20, 2007, Case of *Boyce et al v. Barbados*.
[803]Ibid, §§62, 63.
[804]Ibid, §78.
[805]Ibid, §127 (b).
[806]IACtHR, (Judgement) September 24, 2009, Case of *Dacosta Cadogan v. Barbados*.
[807]IACtHR, (Judgement) August 12, 2008, Case of *Heliodoro Portugal v. Panama.*

ACHR due to the national authorities' failure to define the crime of enforced disappearance of persons as an autonomous offense within domestic law.[808] For the IACtHR, this omission prevented the establishment of effective criminal proceedings. The IACtHR ruled that this obligation arose for the state authorities in Panama on March 28, 1996, when the Inter-American Convention on Forced Disappearances of Persons entered into force in the country.[809] In *Radilla Pacheco v. Mexico*,[810] the IACtHR also ordered the amendment of domestic law due to the failure of the domestic authorities to appropriately define the crime of enforced disappearance within domestic law. The IACtHR established the state authorities' duty to practice conventionality control of domestic legislation in both cases. Due to their consistent references to inter-American legislation and jurisprudence, these cases demonstrate the correct use of conventionality control as a means to bring domestic legislation into accordance with inter-American human rights law.

Finally, it is worth mentioning at least one case in which the practice of conventionality control was not appropriate. As we have seen in Chapter V, in *Artavia Murillo v. Costa Rica*,[811] the IACtHR practiced the strong review of the regulation of in vitro fertilization within Costa Rican law. The IACtHR ruled that state authorities had to lift prohibitions on in vitro fertilization and regulate its implementation by public health care services. The measures ordered in this instance were completely detached from the evolution of inter-American human rights legislation and jurisprudence. Moreover, the IACtHR ignored the previous proposals within domestic law that intended to absolutely prohibit the practice of in vitro fertilization in the country. Hence, this case did not represent an appropriate example of strong inter-American judicial review of domestic law within the IAS.[812]

There are some important conclusions from this brief case study of the practice of conventionality control. Strong inter-American judicial review should be a remedy for domestic legislation that flagrantly violates inter-American human rights law. These violations should be

[808]Ibid, §183.
[809]Ibid, §185.
[810]IACtHR (Judgement) November 23, 2009, Case of *Radilla Pacheco v. Mexico*.
[811]IACtHR, (Judgement) November 28, 2012, Case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*.
[812]As González-Dominguez has also pointed out: "asking domestic authorities to control the conventionality of domestic laws following the standards developed in the case law of forced disappearance, which is line of jurisprudence connected with serious and unquestionable violations to human dignity, is not the same thing as asking domestic authorities to control the conventionality of domestic laws following standards developed in the case law on the right to life of the unborn." Pablo González-Dominguez, The Doctrine of Conventionality Control. Between Uniformity and Legal Pluralism in the Inter-American Human Rights System, (Cambridge et al: Intersentia, 2018), 250.

so flagrant that they do not allow domestic authorities to arrive at another interpretation on the validity of the reviewed statutes. If domestic legislation brings about flagrant violations of inter-American human rights law, this legislation should be invalidated by the IACtHR based on Art. 2 ACHR and the court should demand that national authorities enforce this decision within domestic law. To establish flagrant violations of inter-American human rights law, legal authorities should ask questions like: i) Are there sufficient legislative and jurisprudential elements that justify strong inter-American judicial review in a specific case? This first question refers to the political and legal outcomes of inter-institutional interaction within the IAS and leads to a cascade of questions like: ii) Has the respondent state *frequently* violated the same ACHR provisions by retaining inconsistent domestic legislation?;[813] iii) Could a legislative amendment avoid future violations of the convention?; iv) Is there a converging approach among the member states with respect to the disputed domestic piece of legislation?; v) Have the most authoritative domestic courts already addressed the disputed issue and, most importantly, have they referred to the IACtHR interpretation of the matter?;[814] vi) Have domestic authorities provided justification for not abiding by inter-American jurisprudence on the matter?;[815] vii) Have domestic authorities previously adopted the interpretation that is now contested by new elected authorities?; viii) Is there member state compliance with the IACtHR's interpretation of the disputed issue in similar cases?

The practice of strong inter-American judicial review involves all these questions. Indeed, several other questions could be raised about the dynamic practice of strong review given that human rights law is constantly evolving at the different levels of legal enforcement in Latin America. The most important feature of mixed-form theory with regard to the practice of strong international review is that the IACtHR should consistently refer to inter-American legislation and jurisprudence as a means to establish the flagrant violations of inter-American human rights law. If the IACtHR could strengthen the arguments for practicing strong international judicial review based on the evolution of domestic and inter-American human rights law, it might avoid being criticized for practicing judicial activism.

[813]For González-Dominguez, conventionality control should be strongly enforced as an international obligation "when a state is flagrantly and systematically violating core aspects of the Inter-American *Corpus Juris* by maintaining or adopting domestic laws or practices manifestly anti-conventional." Ibid, 184.
[814]The IACtHR may establish the state authorities' duty of conventionality control based on the fact that these domestic authorities have ignored inter-American human rights jurisprudence and therefore *flagrantly* underenforced the ACHR provisions.
[815]This is based on the argument that inter-American human rights law increases national authorities' burdens of justification.

It is worth underscoring that the majority of rights protected by inter-American human rights law are civil and political rights. Even if the practice of strong review in cases involving these rights is legitimate for the reasons provided above, the IACtHR should strive for consistency in the evolution of conventionality control case law. Successful experiences at the domestic level, like fundamental rights adjudication by the German constitutional court, show that courts may professionally, i.e., by means of appropriate legal argumentation, strengthen their authority within legal systems and that other institutions will not necessarily oppose strong-form judicial review.[816]

In the case of Latin American constitutional law, adopting this professional approach to strong inter-American judicial review is necessary for the appropriate evolution of human rights protection in the region. The practice of judicial activism is arguably a signal of the IACtHR's lack of methodology. Authoritarian governments might even opportunistically contest the IACtHR's alleged international juristocracy in order to justify domestic human rights violations. The court should therefore adopt the most professional approach possible to the practice of strong review in order to avoid losing its legitimacy among all IAS member states.

Despite being cautious with strong inter-American judicial review, the IACtHR should still be able to introduce innovative features into human rights jurisprudence. These innovative features should only be consistently linked to legislation and jurisprudence when they involve the review of domestic legislation. Even if some scholars argue that jurisprudence should be taken only as a subsidiary source of international law, it is the inter-institutional interaction between domestic and inter-American authorities that truly matters for the further evolution of human rights enforcement in Latin America. Weak inter-American judicial review should also attribute great weight to this inter-institutional interaction within the IAS as this study will explain in the following.

6.3.2. Weak inter-American judicial review

In this section, weak review is offered as an appropriate form of inter-American judicial review in cases involving socioeconomic rights. A major problem with the judicial enforcement of these rights is the misconception that they necessarily involve the practice of strong review.

[816]See: Michaela Hailbronner, Traditions and Transformations: The Rise of German Constitutionalism, (Oxford: Oxford University Press, 2015).

This problem can be illustrated by the discussion of adjudication's fiscal impacts at the domestic level. The judicial enforcement of socioeconomic rights is often regarded as expensive and involving measures that can affect government budgets in a non-democratic way. Mark Tushnet has addressed this general perception in legal scholarship: "The assumption that courts exercise strong-form review pervades the literature critical of judicial enforcement of social and economic rights."[817] In Brazil, for instance, courts have frequently established the government's duty to provide expensive medication for the treatment of rare diseases. This domestic example of strong judicial enforcement of socioeconomic rights leads to the question of whether the IACtHR might necessarily follow the same path.

However, it is important to avoid this misconception of a necessary relationship between socioeconomic rights and strong judicial review. How could we avoid this misconception and offer a viable approach to international socioeconomic rights adjudication? There are two different tasks associated with socioeconomic rights adjudication: a general and a concrete task. At the general level, the task is, following Jeremy Waldron on this point, to integrate socioeconomic rights into "a general theory of justice, which will address in a principled way whatever trade-offs and balancing are necessary for their institutionalization in a world characterized by scarcity and conflict."[818] In a more concrete sense, the task is to establish more frequent and meaningful interaction between domestic and inter-American authorities with regard to socioeconomic rights enforcement. This study argues that weak inter-American judicial review is the best way for both the general and the concrete tasks.

Socioeconomic rights should not be taken as mere intentions to provide collective welfare. They are not just programmatic rules. The old-fashioned interpretation that these rights are mere declarations of social welfare has weakened their normative value. Likewise, their inclusion within constitutional texts as simple programmatic norms has frequently hindered their actual enforcement. The adoption of transformative constitutional texts might paradoxically represent a risk regarding the normative sense of socioeconomic rights. Legal authorities and scholars are right to worry about promises that the state authorities will not be able to fulfill in the future.[819] These constitutionalized socioeconomic rights may indeed

[817]Mark Tushnet, Weak Courts, Strong Rights, 231.
[818]Jeremy Waldron, Liberal Rights. Collected papers 1981-1991, (Cambridge: Cambridge University Press, 1993), 33.
[819]This has turned many constitutions into what Karl Loewenstein once described as "nominalist constitutions." On this issue, see: Karl Loewenstein, Verfassungslehre, trans. Rüdiger Boerner, 2nd ed. (Tübingen: Mohr Siebeck, 1969), 152-153. Marcelo Neves has called attention to the dangerous hypertrophy of the symbolic dimension of

become self-fulfilling prophecies in their political communities.[820] Beyond including socioeconomic rights into constitutional texts, how is it possible to include them into the general framework of justice that Waldron has mentioned? There are two main ways for doing that: more specific legislation and legal interpretation. Here, it is worth focusing on these two ways of strengthening the normative force of socioeconomic rights within inter-American human rights legislation and jurisprudence.

Regarding legislation, the IAS member states have gradually increased the inter-American framework for socioeconomic rights adjudication. The Protocol of San Salvador (PSS) dates from 1988 and was the first effort to address socioeconomic rights in a more specific form.[821] Before the PSS was adopted, mentions of socioeconomic rights were limited to the preamble of the ACHR and to the OAS Charter. As this study has already mentioned, the PSS lists a wide catalogue of socioeconomic rights. This protocol also established the progressive enforcement obligation, which leads to duties such as the non-adoption of retrogressive measures with regard to socioeconomic rights. In 2012 the OAS member states adopted the Social Charter of the Americas, which established the state's obligation to promote development with the aim of eliminating poverty and achieving a decent standard of living for all.[822] The charter also referred to the duty of progressive enforcement of socioeconomic rights "through policies and programs that they consider are the most effective and appropriate for their needs, in accordance with their democratic processes and available resources."[823] This duty also refers to the obligation "to make efforts, domestically and internationally (…) to eliminate obstacles to development with a view to achieving full enjoyment" of human rights.[824] Progressive development also encompasses the implementation of public policies that aim to achieve economic development with social justice,[825] and that give priority to persons living in conditions of poverty.[826]

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constitutional texts, see: Marcelo Neves, Die Symbolische Konstitutionalisierung, (Berlin: Duncker & Humblot, 1998).

[820]This is one of the main reasons why Cass Sunstein has referred to the inclusion of a broad catalogue of socioeconomic rights into east-European constitutions as a catastrophe. Cass Sunstein, "Against Positive Rights," East European Constitutional Review 2, (1993), 35-38. Sunstein has claimed that: "a constitution is in large part a legal document, with concrete tasks. If the Constitution tries to specify everything to which a decent society commits itself, it threatens to become a mere piece of paper, worth nothing in the real world." Ibid, 36.

[821]As mentioned, this protocol entered into force in 1999.

[822]Social Charter of the Americas, art. 1.

[823]Ibid, art. 2.

[824]Ibid, art. 7.

[825]Ibid, art. 9.

[826]Ibid, art. 14.

The inter-American institutions also followed this evolution of inter-American legislation on socioeconomic rights. In 2012, the IACHR established the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights. The IACtHR judges have also started to address socioeconomic rights with more attention, which brings us to the role legal interpretation has played for strengthening the normative force of socioeconomic rights. This role can be best illustrated by Latin American transformative constitutionalism, which led to the interpretation in favor of the judicially enforceable character of socioeconomic rights at the domestic level and, more recently, at the inter-American level. Gradually, by means of new inter-American documents on socioeconomic rights and innovative legal interpretation, inter-American authorities have tried to fulfil the general task of introducing socioeconomic rights to the regional framework of justice.

However, the inclusion of socioeconomic rights into the inter-American framework for human rights adjudication is not enough. The concrete task of promoting more dialogue on these rights between inter-American and domestic authorities cannot be ignored. Regarding the task involving inter-institutional interaction, the IACtHR has failed in this concrete task within the IAS. Inter-American case law on socioeconomic rights shows evidence that the direct enforcement of these rights can involve the practice of strong inter-American judicial review. This chapter has argued that the IACtHR should limit its authority to the weak review of cases involving domestic legislation on socioeconomic rights. According to the type of decision-making within weak judicial review, the IACtHR should review legislation on socioeconomic rights in a way that is "relatively broad in scope ex ante, and non-final in nature ex post."[827] What does it mean that the IACtHR should adopt this form of decision-making in cases involving socioeconomic rights?

The broad scope of weak judicial review refers to the IACtHR's authority to rule on claims that allege violations of Art. 26 ACHR. These claims usually include references to other inter-American documents on socioeconomic rights, especially the PSS and the Social Charter of the Americas. It is worth remembering that the debate on the judicial enforceable character of Art. 26 ACHR has been settled within the IACtHR, as Chapter III of this study has already explained. The prevailing interpretation is that the IACtHR has competence to rule on violations of socioeconomic rights, even if they are only indirectly addressed by the ACHR. This stronger authority of the IACtHR is compatible with the concept of weak judicial review if it is linked

[827]Dixon, The Core Case for Weak-Form Judicial Review, 2203.

to the non-final character of decision-making. The non-final character of judicial review relates to the possibility of revision by national legislatures of the IACtHR's decisions in cases involving legislation on socioeconomic rights. It is the non-authoritative decision-making that can promote more dialogue between inter-American and domestic authorities within the IAS.

This non-resolutive character of decision-making has not been the approach adopted by the IACtHR when practicing the direct enforcement of socioeconomic rights. As this study has pointed out, some IACtHR judges have even claimed that weak review is not a viable approach within inter-American human rights jurisprudence. This is arguably a wrong interpretation of the practice of transformative constitutionalism at the inter-American level. The IACtHR should opt for weak review of legislation on socioeconomic rights due to the many advantages of this form of decision-making for the judicial enforcement of these rights. By adopting weak inter-American judicial review, the court can follow the evolution of inter-American human rights legislation and jurisprudence in a more consistent way. This more consistent way strengthens the legitimacy of the practice of inter-American judicial review as a whole.

Weak judicial review decision-making may also improve the effectiveness of the direct enforcement of socioeconomic rights given that it involves a multi-institutional approach to this matter. Çali and Koch have underscored the advantages of a deliberative model of socioeconomic rights enforcement involving national and international authorities within regional systems for human rights protection.[828] For them, one deliberative approach "allows states to realistically assess what measures need to be taken to remedy rights violations and provides non-governmental organizations with entry points to influence early stage decisions regarding suitable remedies."[829] Moreover, "by affording states more ownership of compliance decisions" the deliberative approach "increases the legitimacy of the process in the eyes of respondent states and has the potential to offset backlashes against enforcement."[830]

Finally, it is worth remembering that the multilevel inter-institutional interaction promoted by weak judicial review decision-making is essential to dealing with the ordinary

[828]Başak Çali, Anne Koch, "Explaining Compliance: Lessons from Civil and Political Rights," in *Social Rights Judgements and the Politics of Compliance. Making it Stick*, eds. Malcolm Langford, César Rodríguez-Garavito, Julieta Rossi (Cambridge et al.: Cambridge University Press, 2017), 43-74, 66-69. The authors have referred to the deliberative compliance model adopted by the ECtHR, in which "the Court does not have to spell out the compliance requirements for each and every case." Ibid, 65.
[829]Ibid, 70.
[830]Ibid.

legislative pathologies (blind spots and burdens of inertia) regarding domestic legislation on socioeconomic rights. Weak review can promote more inter-institutional interaction on socioeconomic rights legislation and, over time, add new legislative and jurisprudential approaches into the inter-American framework for socioeconomic rights enforcement. This is a necessary step for the further evolution of inter-American human rights law, which makes weak inter-American judicial review an indispensable feature to be added to inter-American human rights jurisprudence. More specifically, when practicing the direct enforcement of socioeconomic rights, the IACtHR should give national authorities the final say on the validity of legislation on these rights. This means that the court should avoid practicing the conventionality control of domestic statutes on socioeconomic rights and opt for a deliberative approach to their judicial review. This deliberative approach should involve more conversation with national authorities about the ordinary legislative pathologies that affect the domestic enforcement of socioeconomic rights, which can arguably strengthen the normative dimension of these rights over time.

6.4. Conclusion: The legitimacy and effectiveness of mixed-form inter-American judicial review

State-perpetrated systematic violations have been the most defining feature of the Latin American human rights enforcement context. This becomes especially clear when we address the issues of authoritarianism and material inequality, which persist due to the state violations of civil, political, and socioeconomic rights. Within this context of systematic human rights violations, the IACtHR has developed specific forms of strong inter-American judicial review in order to align state practices with inter-American human rights law. As Chapter III has explained, the IACtHR started reviewing domestic laws pertaining to civil and political rights during the first major phase of inter-American jurisprudence, i.e., the transitional justice phase. More recently, the court has extended its authority to socioeconomic rights by directly enforcing these rights, which has led to the transformative justice phase. Inter-American case law on socioeconomic rights demonstrates that the IACtHR will probably adopt strong inter-American judicial review on domestic laws pertaining to these rights in the near future. Despite the fact that the IACtHR has consistently opposed the systematic human rights underenforcement in Latin America by practicing strong inter-American judicial review, the court is ignoring the advantages that alternative approaches may have for the legitimacy and effectiveness of inter-American human jurisprudence.

This chapter has introduced the concept of weak judicial review as a valuable approach to inter-American judicial review. Within weak review decision-making, courts may adopt a non-final approach to reviewing legislation, i.e., they may give legislatures the final say on this matter. Steven Gardbaum has described weak judicial review as a form of decision-making in which a final stage of political rights review of legislation by legislatures is the most important stage. Weak review decision-making is best described by Rosalind Dixon as "broad in scope ex ante, non-final in nature ex post"[831] or as a "broad but revisable review."[832] Within this form of decision-making, courts may invalidate laws, but they do not necessarily need to strongly review them, i.e., strike them down or order legislatures to amend them within domestic law. This chapter has also tried to demonstrate the advantages of introducing weak review into inter-American human rights jurisprudence for the greater legitimacy and effectiveness of the direct enforcement of socioeconomic rights. This leads us to the theory of mixed-form inter-American judicial review.

Mixed-form inter-American judicial review is intended to be a context-specific theory of human rights adjudication for the IACtHR. This mixed-form theory does not ignore the complex context in which inter-American judicial review has emerged and evolved. However, it tries to offer a better approach to international judicial review in light of the contemporary phase of inter-American human rights jurisprudence. Within this contemporary phase, strong review should be limited to cases involving legislation that is flagrantly offensive to the civil and political rights protected by inter-American human rights law. This involves the fact that the normative dimension of civil and political rights has been most effectively developed by means of inter-American human rights legislation and jurisprudence. Several inter-American documents on the protection of civil and political rights have lent these rights a stronger normative dimension. The IAS member states that ratified the inter-American conventions and protocols on the protection of civil and political rights should, in turn, not be allowed to violate these same documents by adopting inconsistent legislation within domestic law. The dignity of inter-American human rights legislation is the first element to bring legitimacy to the practice of strong inter-American judicial review of domestic law in cases that involve flagrant violations of civil and political rights.

[831]Rosalind Dixon, The Core Case for Weak-Form Judicial Review, 2203.
[832]Ibid.

Within inter-American human rights jurisprudence, conventionality control has emerged as the first specific form of strong inter-American judicial review. However, conventionality control has not been mentioned by any inter-American convention or treaty to date. This chapter has argued that this is not a violation of the dignity of inter-American human rights legislation. This argument is based on the circumstances in which conventionality control emerged and its further evolution within inter-American and domestic human rights law. Latin American states share a fundamental obligation of strengthening the legitimacy of their governments within the contemporary international order. There are several ways of fulfilling this fundamental obligation. For all of these alternatives, the principle of salience should act as the criterium of selection. Conventionality control has become the most salient way of strengthening the legitimacy of Latin American states within the IAS. Most of these states were recently ruled by authoritarian governments and now have the opportunity to demonstrate to the international community that they are committed to human rights enforcement in a consistent way.

The implementation of conventionality control within the IAS demonstrates that it abides by the principle of salience when it comes to amending domestic laws that flagrantly violates inter-American human rights documents on civil and political rights. The IACtHR should therefore limit the practice of strong judicial review to cases involving these rights. In these cases, the IACtHR can avoid the practice of international judicial activism, given that the court is able to consistently refer to inter-American documents and jurisprudence when reviewing domestic law. This is the most legitimate and effective way of practicing strong inter-American judicial review. By doing so, the IACtHR can serve as a legitimate control body in case inconsistent domestic legislation is adopted by an IAS member state.

Still, according to the theory of mixed-form inter-American judicial review, the IACtHR should limit its authority to practicing the weak review of domestic laws on socioeconomic rights. This chapter has argued that weak review is the most legitimate approach due to the late evolution of inter-American legislation and case law on these rights. Due to this weak normative dimension of socioeconomic rights within inter-American human rights law, the IACtHR would inevitably be practicing international judicial activism if it extended strong review to the cases involving socioeconomic rights. It is worth emphasizing that weak review decision-making is the most legitimate alternative in light of the contemporary inter-American framework for human rights adjudication. Over time, national and inter-American authorities

will strengthen the normative dimension of socioeconomic rights by means of legislation and jurisprudence. This may eventually lead to the practice of strong inter-American judicial review in the future. However, taking the contemporary phase of inter-American human rights law as a meaningful reference point, strong review for cases involving socioeconomic rights would represent the practice of judicial activism.

This chapter has also claimed that weak review is also the most effective type of decision-making for cases involving socioeconomic rights. Despite being present in several constitutions, these rights still present substantial challenges to courts when they seek to enforce them. Due to the fact that weak review engages non-judicial institutions in enforcing socioeconomic rights, it can also strengthen the effectiveness of judicial enforcement. Weak review is a dialogic form of judicial decision-making that intends to promote more discussion about legislation within legal systems. This relates to what Tushnet has described as the experimentalist character of weak judicial review,[833] which involves an inter-institutional approach to reviewing legislation. Weak review can become a way of bringing the IACtHR and the highest national authorities together in order to strengthen the normative dimension of socioeconomic rights. The inter-institutional interaction between the IACtHR and national courts and legislatures has the potential to become a valuable source of law with regard to these rights within the IAS.

Although mixed-form theory intends to be the most legitimate and effective approach to inter-American judicial review, it is difficult to address its practical value for the Latin American context in the general terms described above. One way of doing this is providing concrete examples of how this normative model can be useful for the IACtHR and also for national authorities that are supposed to abide by inter-American human rights jurisprudence. The following chapter will try to prove the practical value of this theory by applying it to the review of Brazilian laws.

[833]Tushnet, Weak Court, Strong Rights, 66.

PART IV. THEORY IN ACTION

VII. Mixed-Form inter-American Judicial Review and Brazilian Constitutionalism

This chapter will submit the theory of mixed-form inter-American judicial review to a test. Given that the Brazilian constitution represents a particularly important Latin American cosmopolitan constitution for this study, mixed-form inter-American judicial review will be applied to Brazilian laws and the possible consequences that this may have for Brazilian constitutionalism will be addressed. Mixed-form review can be useful to reviewing two particularly problematic pieces of legislation within Brazilian law: the Brazilian amnesty law (Law No. 6683/1979) and Constitutional Amendment No. 95/2016 (hereinafter CA 95). These two laws are illustrative of the traditional challenges for Brazilian constitutionalism within the Latin American context, i.e., authoritarianism and material inequality. This chapter claims that the mixed-form theory can address these challenges and keep Brazilian constitutional practices on the path to global constitutionalism.

In the following, this chapter will advocate for the practice of strong-form judicial review of the Brazilian amnesty law and weak-form review of CA 95. The following sections will offer the legal basis and also explain the effectiveness of each form of judicial review for each case. Here, the aim is to offer a response to the persistent threats to Brazilian constitutionalism represented by authoritarianism and material inequality. This can be seen as an effort to bring the never-ending cycle of illiberalism in Brazil to an end. If mixed-form inter-American judicial review succeeds at this Brazilian test, it may also serve as a guide for other Latin American democracies that suffer from the same pathologies. Mixed-form inter-American judicial review is certainly not a definitive solution for state-perpetrated systematic human rights underenforcement in Latin America. Nevertheless, it might represent the first step that inter-American and national authorities may take in order to align domestic constitutional practices with global constitutionalism. In a nutshell, mixed-form judicial review can strengthen commitments to human rights enforcement in Brazil, which also has consequences for democracy and the rule of law within domestic law.

These two pieces of legislation have been chosen because they fit the normative model of mixed-form theory and also due to their relevance in the most recent history of Brazilian constitutionalism. This most recent history is in fact illustrative of the never-ending cycle of

illiberalism in Brazil. The non-review of the Brazilian amnesty law, despite two IACtHR's decisions ordering it,[834] illustrates the failure on the part of national authorities to come to terms with the country's authoritarian past. Authoritarianism has recently escalated, which can be represented not exclusively, but prominently, by the election of Brazilian far-right strongman Jair Bolsonaro to the presidency. Mr. Bolsonaro's election reminds Brazilians that authoritarianism is still a significant threat, despite the country having overcome the past dictatorship. CA 95 relates to the disputed austerity measures that have been adopted by the Brazilian government in order to cope with a severe economic crisis since 2015. As a response to this severe crisis, CA 95 has led to rising material inequality in a country that is already well-known for its significant social gap between the poorest and the better-offs. Both pieces of legislation should be reviewed according to inter-American human rights law. In the following, it is worth focusing on how inter-American legislation and jurisprudence offer a legal basis for the review of these Brazilian laws. In line with this, their judicial review might open new prospects for Brazilian constitutionalism because it solves the inconsistent relationship of national authorities with inter-American human rights law. Mixed-form inter-American judicial review can therefore help to take the 1988 constitution out of the vicious cycle of illiberalism brought about by authoritarianism and material inequality in Brazil.

7.1. The Brazilian amnesty law: the case for strong inter-American judicial review

The enforcement of the Brazilian amnesty law by national authorities has already been described as an example of resistance to inter-American human rights jurisprudence. As an introduction to the legal basis for its review, it is worth addressing the contemporary value of this debate. There is no scope for a historical review of the amnesty law in this study, although this statute is related to the difficult evolution of Brazilian constitutionalism in history.[835] The Brazilian amnesty law is an example of how Brazilian authorities have been unable to find a way out of the vicious cycle of authoritarianism in the country. For several reasons relevant in the past and today, Brazilian constitutionalism has been punctuated by a never-ending series of

[834]As Chapter II has already mentioned, they are: IACtHR, (Judgement) November 24, 2010, Case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*; IACtHR, (Judgement) March 15, 2018, Case of *Herzog et al. v. Brazil*.
[835]On the historical context of the adoption of the amnesty statute, see: Lilia M. Schwarcz, Heloisa M. Starling, "On the Path to Democracy: The Transition to Civilian power and the Ambiguities and Legacy of the Military Dictatorship," in *Brazil: A Biography*, trans. Allen Lane, (New York: Farrar Straus and Giroux, 2018), 537-576. The literature on how the Brazilian state has dealt with transitional justice issues is also very relevant. See, for instance: *Transitional Justice. Handbook for Latin America*, ed. Félix Reátegui, (New York: International Center for Transitional Justice, 2011).

authoritarian flashbacks. Several prominent Brazilian legal scholars have referred to the persistence of authoritarian rule in the country. For José Afonso da Silva, explicit or hidden authoritarianism has been the prevailing element in Brazilian constitutional history.[836] Ingo Wolfgang Sarlet has also described the "turbulences and long authoritarian periods" during Brazilian constitutionalism.[837] Finally, Paulo Bonavides has lamented that, in Brazil, new constitutions were never truly new systems of power based on a catalog of principles and rules.[838] Hence, he has described the vicious cycle of authoritarianism as an eternal constituent crisis that "has existed since the origins of the Brazilian state and it has still not been solved."[839]

The continuing validity of the amnesty statute (Law No. 6683/79) relates to this eternal constituent crisis in Brazil. It seems that the 1987-1988 constituent assembly has failed to build a new constitutional order that breaks out of this authoritarian cycle. The main piece of evidence that the validity of the amnesty law was not the best way to deal with the country's authoritarian past is that authoritarianism is once again back to the Brazilian political debate. The election of Jair Bolsonaro to the presidency has brought back the fear of authoritarian rule to Brazil.[840] At the time of writing this chapter, Mr. Bolsonaro's authoritarianism has been restricted to his political speeches. This should be enough for him to be considered a significant threat to the rule of law, democracy and human rights enforcement in Brazil. Mr. Bolsonaro has long praised the rule of the 1964-1985 military dictatorship. He has described the rise of the military to power in 1964 as a civil society movement, not a *coup d'état*. During his campaign he has also time and again showed troubling conceptions of human rights. He has frequently been offensive to women, black people and LGTB people, which reveals his disregard for minority rights. Moreover, he has advocated very controversial stricter policies against crime and corruption throughout his "law and order" political campaign. He has claimed, for instance, that police force should not be held accountable during raids in the Brazilian favelas. For him, this would intimidate criminals and provide a safer environment for the *good* Brazilians.[841]

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[836]José Afonso da Silva, O Constitucionalismo Brasileiro: Evolução institucional, (São Paulo: Malheiros Editores, 2011), 89.
[837]Ingo Wolfang Sarlet, "Breves Notas sobre a Evolução Constitucional Brasileira de 1824 a 1988," in *História do Direito Brasileiro. Leituras da Ordem Jurídica Nacional*, ed. Eduardo Bittar, 4th ed., (São Paulo: Atlas, 2017), 263-290, 287.
[838]Paulo Bonavides, Curso de Direito Constitucional, 24th ed., (São Paulo: Malheiros Editores, 2009), 381.
[839]Ibid, 384.
[840]On the circumstances of his election, see: Juliano Zaiden Benvindo, "Brazil's 'False Consciousness of Time': The Rise of Jair Bolsonaro," Int'l J. Const. L. Blog, November 10, 2018, available at: http://www.iconnectblog.com/2018/11/brazils-false-consciousness-of-time-the-rise-of-jair-bolsonaro.
[841]It is needless to point out that this might result in the massacre of Brazil's poorest people, since it legitimates the arbitrary use of police force more specifically in peripheral urban areas.

Mr. Bolsonaro's election is part of the long cycle of authoritarianism in Brazilian politics that has threatened the exercise of civil rights and political liberties in the country.[842] In fact, Brazilian authorities have showed an enduring willingness for authoritarian rule. For most of the 20th century, the country was ruled by strongmen, usually leaders with great political charisma, who were unable to bring the promised global relevance to the country.[843] This seems to be the case of Mr. Bolsonaro. The most accurate descriptions of Mr. Bolsonaro's political profile, at least based on his political speeches and activities during more than 16 years as a deputy, fairly relate to Jan-Werner Müller's analysis of populism[844] or even Jason Stanley's analysis of how fascism works in contemporary times.[845] For Stanley, fascism in current times stands for "ultranationalism of some variety (…) with the nation represented in the person of an authoritarian leader who speaks on its behalf."[846] Contemporary fascism, he has argued, relies on different strategies to seize and exercise power, like i) praising a mythic past, ii) propaganda (or even unreality with the sharing of fake news), iii) anti-intellectualism and iv) victimhood, which places the leader as a national hero.[847] All these political strategies apply to the attitude that Mr. Bolsonaro adopted during his 2018 political campaign.[848]

Despite the fact that Mr. Bolsonaro's election keeps the debate about authoritarianism in Brazil alive, it is important to stress that this study does not want to advance a militant discourse against his government based on what he promised in his campaign, although many issues are indeed incompatible with the Brazilian constitution. The first reason for this non-

[842]It is worth distinguishing authoritarianism and totalitarianism based on Karl Loewenstein's interpretation of these categories. See: Karl Loewenstein, Verfassungslehre, trans. Rüdiger Boerner, (Tübingen: Mohr Siebeck, 1969), 52-58. Loewenstein applied this distinction to the Brazilian context in his book about the Getúlio Vargas's government. See: Karl Loewenstein, Brazil Under Vargas, (New York: McMillan, 1942). For him, authoritarianism "refers to the form of government, to the type and technique of the policy-forming power." Loewenstein, Brazil Under Vargas, 370. By contrast, totalitarianism "refers to a way of life, to social factors. It implies that the sphere of private life of the individual citizen or subject is subordinated to the public policies of the state to the point of obliteration." Ibid. As Loewenstein very accurately noted: "If there is anything which is commonly shared by Brazilian people it is their ingrained aversion to all forms of totalitarian intrusion upon their privacy." Ibid. These observations remain true in contemporary times.

[843]Throughout the 20th century Brazil experienced long times under authoritarian rule. Getúlio Vargas, for instance, took power with the help of a military junta in 1930 and stayed in the presidency of Brazil until 1945.

[844]For Müller, populists try to delegitimize others based on the argument that they are the only legitimate representatives of the people. See: Jan-Werner Müller, What is Populism?, (Philadelphia: University of Pennsylvania Press, 2016).

[845]Jason Stanley, How Fascism Works. The Politics of Us and Them, (New York: Random House, 2018).

[846]Ibid, Introduction, xiv.

[847]Ibid, 3-108.

[848]Mr. Bolsonaro can be compared to similar contemporary heads of government in countries like Russia, Hungary, Poland, India, Turkey, and in the United States. This kind of politicians represent a significant threat to democracy, the rule of law, and human rights enforcement in their respective countries and in the international community as a whole. As Steven Levitsky and Daniel Ziblatt have claimed, they can lead to a gradual deterioration of democracy. See: Steven Levitsky, Daniel Ziblatt, How Democracies Die, (New York: Crown Publishing, 2018).

militant approach is that it would be simply speculation about the future. Mr. Bolsonaro may likely change his political rhetoric throughout his administration, which would be no novelty among politicians.[849] A second reason is that this militant discourse against him does not play an important role in the normative model of mixed-form international judicial review that this study proposes. It just turns this normative model more necessary in light of the current Brazilian political situation. This study does not aim to take a far-right populist out of the government. It aims to turn the constitutional landscape into an unwelcoming environment for the rise of populism and authoritarianism. This can be achieved by means of the enforcement of national and inter-American human rights law. This obviously leaves little scope for a populist in the government of Brazil, but that is only a necessary consequence.[850] That been said, this study will now offer reasons for the review of the Brazilian amnesty statute within domestic law. The review of this statute by the IACtHR was a case of strong-form inter-American judicial review, i.e., the IACtHR ordered national authorities to invalidate the domestic amnesty statute. The legitimacy of strong-form review in this case is largely based on the evolution of inter-American human rights jurisprudence on amnesty laws and its enforcement by national authorities of different IAS member states. This evolution and enforcement of inter-American jurisprudence on amnesty laws will be addressed in the following section.

7.1.1. The evolution and enforcement of inter-American human rights jurisprudence on amnesty laws

As it is well-known, many Latin American countries have endured dictatorships in their recent past. Most of these authoritarian regimes adopted amnesty statutes as a condition for domestic democratization. The human rights violations practiced by some of these authoritarian regimes were later addressed by the IACtHR based on the ACHR, when the court had the

[849]This does not seem likely to happen after months of his administration. It is true that the president is facing opposition from Congress and from courts. However, it is still uncertain whether Brazilian democratic institutions will be able to limit his presidential powers in order to combat his authoritarianism. Juliano Benvindo's studies illustrate well this contemporary challenge for Brazilian democratic institutions. See: Juliano Zaiden Benvindo, "The Party Fragmentation Paradox in Brazil: A Shield Against Authoritarianism?," Int'l J. Const. L. Blog, October 24, 2019, available at: http://www.iconnectblog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/; See also: Juliano Zaiden Benvindo, "Populism Meets Congressional Backlash in Brazil: Recasting Executive-Legislative Relations?," Constitutionnet, July 4, 2019, available at: http://constitutionnet.org/news/populism-meets-congressional-backlash-brazil-recasting-executive-legislative-relations.

[850]This represents an institutional way of dealing with Brazilian *sui generis* populism.

opportunity to invalidate domestic amnesty laws. As Louise Mallinder has claimed, inter-American jurisprudence and domestic compliance with it have represented a regional trend of "an outright rejection of amnesties for international crimes and gross human rights violations enacted during dictatorships."[851] Laurence Burgorgue-Larsen has also pointed out that the "anti-impunity" approach to amnesty laws is the key to understanding the "jurisprudential politics" of the IACtHR in Latin America.[852] This jurisprudential politics led to an overall rejection of amnesty laws in the region and it can be illustrated, for instance, by Judge Cançado Trindade's concurring opinion on *Barrios Altos v. Peru*, whereby he described amnesty laws as "nothing but an aberration, an inadmissible affront to the juridical conscience of humanity."[853]

According to inter-American jurisprudence on amnesty laws, there is neither legitimacy nor a legal basis for the validity of the Brazilian amnesty law. One of the core arguments for its review is that other Latin American countries, despite the many political and economic costs involved with compliance, have enforced the IACtHR decisions that invalidated amnesty laws.[854] This common practice has arguably become regional customary human rights law. This study has already addressed the resistance on the part of the Brazilian authorities towards inter-American jurisprudence on amnesty laws in Chapter II. Most prominently, the Brazilian constitutional court refused to adopt the IACtHR's interpretation of the invalidity of the Brazilian amnesty statute. This section will argue why especially these Brazilian judicial authorities should review this severe violation of inter-American human rights law. As mentioned, this relates to the evolution of inter-American jurisprudence on amnesty laws. A close analysis of the IACtHR's decisions and compliance with them by the corresponding national authorities of Peru, Chile, Uruguay and El Salvador can illustrate this evolution. The IACtHR was in fact successful in all cases within this specific inter-American case law. However, national authorities defied the authority of the court on several occasions. This

[851]Louise Mallinder, "The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws," International and Comparative Law Quarterly 65, (2016), 645-680, 649. She has also pointed out that "limited amnesties that exclude gross human rights violations can be permissible provided that the limitations are applied in practice." Ibid. This section will later address this possible use of amnesty laws within the IAS.

[852]Laurence Burgorgue-Larsen, "La Erradicación de la Impunidad: Claves para Decifrar la Política Jurisprudencial de la Corte Interamericana de Derechos Humanos," in *El Control Difuso de Convencionalidad. Dialogo de la Corte Interamericana de Derechos Humanos y los Jueces Nacionales*, ed. Eduardo Ferrer Mac-Gregor, (México: Fundación Universitaria de Derecho, Administración y Política, 2012), 33-62.

[853]IACtHR, (Concurring Opinion of Judge Antonio Augusto Cançado Trindade) March 14, 2001, Case of *Barrios Altos v. Peru*, § 26.

[854]As the IACtHR noted: "… all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations." IACtHR, *Gomes Lund v. Brazil*, §170.

happened before and after the emergence of conventionality control.[855] The following analysis does not focus on full compliance with inter-American decisions, given that this would involve analyzing several ordered measures.[856] Hence, compliance analysis relies on domestic adoption of the IACtHR's core positions as a means to ensure the effectiveness of strong inter-American judicial review within domestic law.

The first case of inter-American judicial review of an amnesty law was *Barrios Altos v. Peru*,[857] which concerned the international state responsibility of Peru in the non-investigation, prosecution and punishment of human rights violations carried out especially during the authoritarian regime of Alberto Fujimori (1990-2000). *Barrios Altos* needs to be analyzed in connection with the case of *La Cantuta v. Peru*,[858] given that both related to Peruvian amnesty laws enacted during Fujimori's dictatorship.[859] In *Barrios Altos*, the Court established that Peru was responsible for violations of the right to life of 15 persons and the right to personal integrity of 4 persons who, in November 1991, were seriously injured in a facility situated in the neighborhood of Lima. In *La Cantuta*, the IACtHR found Peru responsible for violations of the right to life, personal integrity and personal liberty of one teacher and nine students of the University of La Cantuta, who were illegally and arbitrarily detained in July 1992. The teacher and one of the students were proved to be executed, while the remaining eight people have been missing since then. In both cases, the human rights violations were carried out by the *Grupo Colina*, a death squad linked to the Peruvian National Intelligence Service that operated with the knowledge of the Presidency of the Republic and the army command. The death squad promoted several repression campaigns, many of them against the oppositional armed group known as the *Sendero Luminoso* (The Shining Path).

[855]Generally, the IACtHR invalidation of amnesty laws has been based on an extensive interpretation of Art. 2 ACHR. Invoking this article, the IACtHR has ordered states to amend their corresponding domestic legal orders as a means to avoid conflicts with the ACHR. It is worth mentioning that Art. 2 ACHR has gained more importance throughout the evolution of inter-American jurisprudence after the IACHR started to refer cases to the IACtHR alleging violations of this ACHR provision. On this issue, see: Laurence Burgorgue-Larsen, "The Right to ad intra Enforcement of the Convention," in *The Inter-American Court of Human Rights. Case Law and Commentary*, eds. Laurence Burgorgue-Larsen, Amaya Úbeda de Torres, (New York, Oxford University Press, 2011), 243-268.
[856]The ordered reparations in the cases ranged from simply symbolic measures, like publishing the judgement in state press outlets, to even more lengthy and complex remedies, like the review or amendment of domestic legislation.
[857]IACtHR, (Judgement) March 14, 2001, Case of *Barrios Altos v. Peru*.
[858]IACtHR, (Judgement) November 29, 2006, Case of *La Cantuta v. Peru*.
[859]These two cases involved the "systematic practice of illegal and arbitrary detentions, torture, extra-legal executions and forced disappearances" with the knowledge or "even ordered by the highest command of the armed forces, the intelligence services and the then governing Executive" and whose main victims were people "labelled as subversive or somehow contrary or in opposition to the Government." IACtHR, *La Cantuta v. Peru*, §81.

An investigation of the facts of the cases was not possible due to the general climate of impunity that prevailed in Peru during the military government that took power after a *coup d'état* on April 5, 1992. The non-prosecution of human rights violations was a common practice that was ensured through several means, but especially by the delegation of investigations to military courts. In several cases, the authority has been taken from ordinary courts and referred to military courts in order to hinder the investigations for years and ensure the impunity of the military commando. Other common practices to secure impunity were the removal of judges and prosecutors from their activities and, most importantly for the analysis here, the enactment of amnesty laws.[860]

The IACtHR first declared the Peruvian amnesty laws invalid on the grounds that they hindered the investigation, prosecution and punishment of serious human rights violations carried out by the Peruvian military state.[861] In a later interpretation of *Barrios Altos*, the IACtHR established the general effects of the decision due to the nature of the violation represented by the amnesty laws.[862] Peruvian authorities complied with these IACtHR decisions.[863] These decisions represented one of the main reasons for dismissing the amnesty laws as a defense argument and reopening criminal investigations within Peruvian law. Moreover, domestic judicial authorities referred to the decisions of *Barrios Altos* and *La Cantuta* within the criminal judgement of Alberto Fujimori. This fact strengthened the authority of inter-American jurisprudence, given that the decisions were adopted as a reference point for the punishment of a prominent political figure based on the human rights violations committed during his administration and with his clear consent.[864]

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[860]On these authoritarian practices that were adopted during Latin American dictatorships, see: Anthony W. Pereira, Political (In)Justice. Authoritarianism and The Rule of Law in Brazil, Chile and Argentina, (Pittsburg: University of Pittsburg Press, 2005).

[861]IACtHR, *Barrios Altos v. Peru*, §§41-44 and 4th operative paragraph.

[862]"Enactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is per se a violation of the Convention for which the State incurs international responsibility. The Court therefore considers that given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, the effects of the decision in the judgment on the merits of the Barrios Altos case *are general in nature*, and the question put to the Court in the Commission's request for interpretation must be so answered," (my emphasis). IACtHR, (Interpretation of the Judgment) September 3, 2001, Case of *Barrios Altos v. Peru*, §18. The IACtHR ruled that "given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, the decision in the judgment on the merits in the Barrios Altos Case has generic effects." Ibid, 2nd operative paragraph.

[863]According to the order of monitory compliance issued on September 22, 2005, the IACtHR found that Peru complied with the duty to enforce the interpretation of the invalidity of Laws No. 26.479 and No. 26.492. See: IACtHR, (Monitoring Compliance with Judgement) September 22, 2005, Case of *Barrios Altos and La Cantuta v. Peru*.

[864]Fujimori was granted a humanitarian pardon in 2017 by president Pedro Pablo Kuczynski, whose administration ended in 2018 after he resigned due to accusations of corruption and alleged vote buying. On the history of compliance with *Barrios Altos* and *La Cantuta*, see: Jorge Contesse, "Case of Barrios Altos and La Cantuta v. Peru," American Journal of International Law 113 (forthcoming 2019), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385493.

In *Almonacid v. Chile*,[865] the IACtHR was asked to rule on the non-investigation of the execution of Mr. Almonacid-Arellano, as well as the non-reparation in favor of his kin, based on the interpretation held by national authorities of the Decree Law No. 2191/1978, equivalent in its effects to an amnesty law in Chile. Mr. Almonacid-Arellano was a 42 years old teacher who, after being arrested at home and arbitrarily shot by the police of his city, died due to the shooting.[866] As in the Peruvian cases, the investigation and prosecution of the case were hindered by the enforcement of the Chilean amnesty law by state authorities even after the country's democratization. On December 5, 1996, the Chilean Supreme Court decided to dismiss the case within the ordinary justice system and alleged that it should be referred to a military court. Not surprisingly, the military justice system was inactive for years and, eventually, the Second Military Court of Santiago dismissed the case based on the Decree Law No. 2191. With this factual basis, the IACtHR ruled that the Chilean decree law was invalid and, for the first time in its jurisprudence, established conventionality control as a specific form of strong inter-American judicial review of domestic laws.[867] Since then, conventionality control was practiced with regard to all others domestic amnesty laws that were judicially reviewed by the IACtHR.

The IACtHR found that Chile complied with the duty to ensure that the Decree Law No. 2191 did not continue to hinder the investigation of Mr. Almonacid-Arellano's case.[868] The IACtHR's decision was, according to a report presented by the Chilean state, the main reason why domestic authorities nullified resolutions and judgements that had previously dismissed the case based on the enforcement of the Chilean amnesty law. The case was referred to ordinary criminal courts and, when faced with a peremptory challenge to the ordinary jurisdiction by the Second Military Court of Santiago, the Chilean Supreme Court dismissed it and maintained the ordinary jurisdiction of the case based on the IACtHR's judgment.[869]

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[865]IACtHR, (Judgement) September 26, 2006, Case of *Almonacid Arellano et al. v. Chile*.

[866]His murder took place in the context of the military dictatorship that took over the government in Chile on September 11, 1973 by means of a coup d'etat. Like other Latin American dictatorships, the Chilean authoritarian government (1973-1990) practiced several human rights violations, which included arbitrary executions, torture, detention and forced disappearance of alleged "state enemies." In fact, civilians could represent a threat simply by their political ideology as in Mr. Arellano's case.

[867]IACtHR, *Almonacid Arellano v. Chile*, §124.

[868]See: IACtHR (Monitoring Compliance with Judgement) November 28, 2010, Case of *Almonacid Arellano v. Chile*.

[869]No later monitory compliance order has been issued to date, but domestic authorities fully complied with the operative paragraphs concerning the investigation of Almonacid Arellano's murder. After domestic criminal investigations, on July 31, 2013 the Chilean Supreme Court dismissed an appeal in favor of Raúl Neveu Cortesi for the execution of Mr. Almonacid Arellano. This decision confirmed his sentence to 5 years in prison.

The conventionality control of the Uruguayan amnesty law was practiced in *Gelman v. Uruguay*.[870] The facts of the case occurred during the civil-military dictatorship in Uruguay (1973-1985), which also represented a period of systematic human rights violations by the Uruguayan armed forces in collaboration with Argentine authorities. In this context, María Claudia Casinelli and her husband Marcelo Ariel Gelman, both Argentines, were arrested and separated in Buenos Aires by Uruguayan and Argentine officials. María Claudia was 19 years old and about seven months pregnant. She was later taken to Montevideo by the Uruguayan authorities on a clandestine flight and held at the headquarters of the Uruguayan Defense Information Service, where she gave birth to a girl. Her baby was taken from her and handed over to a Uruguayan policeman and to his wife, who registered her as her own daughter. Since then, María Claudia has been missing and the criminal investigation of the authorities involved in the case has not been possible based on the enforcement of the *Ley de Caducidad* (Expiry Law or Law No. 15.848).

The most notable feature of *Gelman* is that the Expiry Law in Uruguay was twice confirmed by referenda that happened in 1989 and in 2009. The IACtHR had to address the arguably democratic legitimacy of the Uruguayan amnesty law based on the majoritarian decision of the Uruguayan people. Despite its confirmation by the majority of the Uruguayan people, the IACtHR invalidated the Expiry Law. For the IACtHR, "the democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention" and "particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes an impassable limit to the rule of the majority."[871]

Within domestic law, the Uruguayan national legislature adopted a new statute (Law No. 18.831), which invalidated the previous amnesty law. The executive power also issued Decree 323/2011, which invalidated the administrative acts referring to the Law 15.848. Finally, domestic legal authorities reopened investigations of the case of María Claudia García de Gelman. However, the Uruguayan Supreme Court of Justice did not invalidate the amnesty statute (Law 15.848) within domestic law and, in turn, invalidated some provisions of the new Law 18.831. This domestic court decided against inter-American jurisprudence when it

[870]IACtHR, (Judgement) February 24, 2011, Case of *Gelman v. Uruguay*.
[871]Ibid, §239.

established the end of the expiry period for the prosecution of serious human rights violations in a case whose investigations were hindered by the domestic enforcement of the amnesty statute. However, the state representatives emphasized that the domestic court did not invalidate Art. 1 Law No. 18.831, according to which the state has authority to prosecute the human rights violations committed by public officials during the authoritarian period.[872]

The case of *El Mozote v. El Salvador*[873] involved human rights violations perpetrated by the Salvadoran armed forces during an internal armed conflict, which resulted in the murder of more than 1000 people, the majority of whom were children. *El Mozote* involved the inter-American judicial review of two different types of amnesty laws. The exception of *El Mozote* was due to the fact that the IACtHR established the admissibility of amnesty laws in case of internal armed conflicts. The IACtHR ruled that "amnesty laws are sometimes justified to pave the way to a return to peace."[874] The court established that, due to the internal armed conflict in El Salvador, an amnesty law could be used in order to bring the hostilities to an end. The problematic aspect of the case was that after the National Reconciliation Law, which complied with the requirements of an appropriate use of an amnesty law, the El Salvadorian Congress enacted a general and absolute amnesty statute, which hindered the criminal investigations of all serious human rights abuses committed in the country during the armed conflict. For the IACtHR, the "*ratio legis* of this general amnesty was to render ineffective the Peace Accord," leaving unpunished the crimes committed during the armed conflict.[875]

The IACtHR pointed out that, 20 years after the massacre of El Mozote, investigations have always been dismissed based on the enforcement of the general amnesty law, which has constituted a serious violation of the state's international obligation to investigate and punish human rights offences.[876] Due to these facts, the IACtHR established the invalidity of the second general amnesty statute.[877] Taking this IACtHR decision as a meaningful reference point, state authorities filed the judicial review of the general amnesty law, whose decision by the El Salvadoran Supreme Court took longer than 3 years. Finally, in 2016, this court reviewed the general amnesty law enacted in 1993. This decision abided by the interpretation of the

[872]IACtHR, (Monitoring Compliance with Judgement) March 20, 2013, Case of *Gelman v. Uruguay*, § 32.
[873]IACtHR (Judgement) October 25, 2012, Case of the *Massacres of El Mozote and Surrounding Areas v. El Salvador*.
[874]Ibid, §285.
[875]Ibid, §292.
[876]Ibid, § 295.
[877]Ibid, §318.

IACtHR and the El Salvadoran Supreme Court also established its *erga omnes* effects within domestic law.[878] In the most recent monitory compliance, the IACtHR concluded that the state authorities fully complied with the order to ensure that the general amnesty law no longer represents an obstacle to the investigation of serious human rights violations committed during the internal armed conflict in El Salvador.[879]

7.1.2. The strong judicial review of the Brazilian amnesty law

Based on the above description of the evolution and enforcement of inter-American jurisprudence on amnesty laws, the further enforcement of the Brazilian amnesty law represents a flagrant violation of inter-American human rights law by Brazilian authorities. The contemporary validity of the amnesty law represents a flagrant violation of regional customary human rights law. The Brazilian authorities should follow their Latin American peers and strike down the Brazilian amnesty law. They should no longer enforce this statute because its enforcement has been based on a very controversial interpretation of the 1988 constitution that privileges an illegitimate transitional justice mindset to the detriment of the normative force of the 1988 cosmopolitan constitution and of inter-American human rights law. This chapter has focused on how resistance on the part of the Brazilian authorities to enforce inter-American jurisprudence brings about flagrant violations of the regional practices of judicial review of amnesty statutes.

No other body of case law has become as relevant for the IACtHR authority as the cases involving amnesty laws within the IAS. The Peruvian cases were the first ones in which the IACtHR established the *erga omnes* effects of the invalidation of amnesty laws within the IAS. The Chilean case was responsible for the emergence of conventionality control as a specific form of strong inter-American judicial review. In the Uruguayan case, the IACtHR decided to enforce its own precedent decisions and ruled that even democratic procedures should abide by the principles of international human rights law. In the case involving El Salvador, despite the fact that the IACtHR recognized the possibility that the amnesty law could be appropriately used to bring peace to an internal armed conflict in the country, the court did not hesitate to

[878]Constitutional Chamber of El Salvador, (Judgement) July 13, 2016.
[879]IACtHR, (Monitoring Compliance with Judgement) August 31, 2017, Case of *El Mozote v. El Salvador*, §§11-18.

strike down a subsequently issued general amnesty law. The IACtHR acknowledged that this second statute was issued as a means of leaving serious human rights violations unpunished, as has traditionally been the case with amnesty laws in Latin America.

Even if other domestic authorities have on several occasions resisted the enforcement of inter-American jurisprudence on amnesty laws, like the judges of the Uruguayan Supreme Court of Justice have done, the Brazilian constitutional court posed the most substantial challenge to the effectiveness of inter-American judicial review of amnesty laws. As Chapter II has explained, the Brazilian STF established the constitutionality of the Brazilian amnesty statute within the domestic system of constitutional review.[880] This decision strengthened the provincial and insular development of Brazilian constitutionalism because it ignored the evolution of inter-American human rights jurisprudence on the matter.[881] The Brazilian constitutional court also ignored the IAS member states' converging approach to amnesty statutes within domestic law. The case involving the Brazilian amnesty law illustrates best how national authorities have been responsible for the insular evolution of Brazilian constitutionalism. This leads to the compelling case for Brazilian authorities enforcing the IACtHR decisions in *Gomes Lund* and *Herzog*: By doing so, they could align domestic constitutional practices with the evolution of inter-American human rights law.

Cosmopolitan convergence in this case has consequences for both the inter-American and the domestic levels. By enforcing the IACtHR decisions, the Brazilian constitutional court can guarantee their effectiveness within domestic law. This means that one of the most substantial IAS members would finally abide by the most relevant body of inter-American case law. In this sense, Brazilian authorities can strengthen even more the normative force of regional customary human rights law. However, not only the inter-American authorities would gain from domestic compliance. From another perspective, the Brazilian constitutional court could strengthen the legitimacy of the Brazilian state if they practice the strong review of the amnesty statute. This argument is based on what Dworkin has described as the fundamental

[880]Brazilian STF, (Judgement) April 29, 2010, *Claim of Non-Compliance with a Fundamental Precept (ADPF) No. 153.*

[881]This has been common practice within Brazilian constitutional court's jurisprudence: "Brazil's 1998 acceptance of the jurisdiction of the IACtHR did not immediately alter the almost irrelevant role that the case law of this Court has played in the decision-making process of the Brazilian Supreme Court. References to decisions of the IACtHR were virtually non-existent. Even before 1998, that is, even before Brazil had accepted the IACtHR's jurisdiction, the case law of the IACtHR could have played an important argumentative role, especially in decisions related to human rights. The STF frequently refers to foreign precedents as an argumentative toll, but almost never to those of the [IACtHR]." Virgílio Afonso da Silva, The Constitution of Brazil. A Contextual Analysis, (Oxford et al: Hart Publishing, 2019), 167-168.

obligation of international law and the associated principle of salience.[882] According to this fundamental obligation, states should always try to improve the legitimacy of their own authority as coercive governments. This obligation is especially applicable to the Brazilian state in light of the long periods under authoritarian rule. The principle of salience is the mechanism that selects among the wide range of alternatives available for domestic governments to abide by the fundamental obligation.

As the previous chapter has explained, conventionality control abides by the principle of salience in Latin America. This means that the strong review of the Brazilian amnesty law has become the most salient opportunity for national judicial authorities to improve the legitimacy of the Brazilian state. In this sense, the Brazilian STF has substantial normative reasons to invalidate the Brazilian amnesty statute. These normative reasons relate to the fact that the Brazilian constitutional court cannot simply ignore the consistent evolution of inter-American human rights law, especially with regard to the protection of civil and political rights. The previous chapter has explained how the practice of strong inter-American judicial review, if it is limited to cases involving legislation that flagrantly violates the civil and political rights protected under inter-American human rights law, is the most legitimate approach that the IACtHR could adopt to the practice of international judicial review. The conventionality control of amnesty laws within the IAS abides by all criteria established by the theory of mixed-form inter-American judicial review regarding the practice of strong review of domestic legislation. Given this fact, there is no scope for national authorities to contest the legitimacy of the conventionality control of amnesty laws. There is also no reason why Brazilian authorities should not guarantee the effectiveness of conventionality control of the amnesty statute within domestic law.

Finally, it is worth mentioning that, following the IACtHR decision in *Gomes Lund*, the Brazilian Bar Association (OAB) issued a review of the Brazilian STF's judgement in *ADPF 153*. The decision of this review is still pending. This seems to be the best opportunity for the highest domestic judicial authorities to take a step towards more consistency in human rights enforcement within domestic law. These Brazilian judicial authorities owe it to the international community to invalidate the domestic amnesty statute. They should comply with this duty as soon as possible.

[882]Dworkin's argument has been addressed in Chapter IV and in the previous chapter under "strong inter-American judicial review."

7.2. Constitutional Amendment 95/2016 (CA 95): the case for weak inter-American judicial review

Recent decades have seen a very promising Brazilian economy. Especially after 1994, when the Brazilian currency and inflation stabilized, the country started to benefit from foreign investment and good commodity prices on the international market.[883] These favorable circumstances helped Brazil to once again figure among the most influential global actors, together with the emerging economies of Russia, India, China and South Africa (also known as the BRICS). Within domestic politics, these favorable circumstances enabled significant increases in public spending, which led to the establishment of important social welfare programs and, ultimately, to the rise of 40 million Brazilians out of poverty.[884]

This ended at some point around 2015. Some see the turning point for the Brazilian economic miracle already in June 2013, when millions of Brazilians took the streets to protest against the inefficiency and expense of public service. The protests were first motivated by a rise in public bus fares in metropoles like São Paulo and Rio, but they quickly spread around the country and started to address broader issues like corruption and public security. This widespread public dissatisfaction came as a surprise to the Brazilian government at the time, since they believed that the country was consistently heading towards the end of Brazilian underdevelopment. Brazilian former president, Dilma Rousseff, even called the population ungrateful for not recognizing the accomplishments of the administrations headed by her Workers Party (PT). The widespread dissatisfaction would escalate in the years to come.

The decrease in commodity prices and bad domestic macroeconomic decisions contributed to the most severe economic crisis that Brazilians had experienced in a very long time.[885] In 2015, Brazil's GDP decreased 3.8%, which was followed by another significant drop

[883]This enthusiasm with the Brazilian economy can be illustrated by this 2009 issue of The Economist: The Economist, Brazil Takes Off, November 12, 2009, available at: https://www.economist.com/leaders/2009/11/12/brazil-takes-off.

[884]See: "Almost 40 million Brazilians Climbed to Middle Class in the Last Eight Years," Mercopress, June 28, 2011, available at: http://en.mercopress.com/2011/06/28/almost-40-million-brazilians-climbed-to-middle-class-in-the-last-eight-years.

[885]Paul Krugman recently addressed the macroeconomic causes of the depression; see: Paul Krugman, "What the Hell Happened to Brazil (Wonkish)," New York Times, November 9, 2018, available at: https://www.nytimes.com/2018/11/09/opinion/what-the-hell-happened-to-brazil-wonkish.html

of 3.6% in 2016. This turbulent atmosphere led to the impeachment of Ms. Rousseff and to the rise to power of Michel Temer who, in just two years, adopted a series of very disputed austerity measures in order to respond to the economic crisis. Mr. Temer drastically cut public spending and adopted impressive legislative reforms in his short period in the government. He benefited from his party's majority in the two congressional chambers, which enabled him to pass legislative reforms in a record time. One example is the reform of the Brazilian Labor Code as a way for introducing more flexibility to employment contracts under Brazilian law. Many Brazilian politicians had aimed to pass such reforms, but only Mr. Temer's administration was finally able to so. Mr. Temer promised the reform would significantly increase employment in the country. However, he was proved wrong by the end of his administration. This reform led to the abolition of important workers' rights and to the deregulation of labor contracts. Some points of the reform even drastically violated human rights.[886]

Another example of Mr. Temer's radical reforms was the adoption of Constitutional Amendment 95/2016 (CA 95), also known as the Expenditure Ceiling Act or the new fiscal regime,[887] which represents, according to a very accurate headline, "the mother of all austerity plans."[888] This constitutional amendment came into force in 2017 and established a 20-year social spending freeze. It might represent the most socially regressive austerity package currently in force in the world and it is causing a severe domestic underenforcement of socioeconomic rights. This 20-year freeze in social spending has severe consequences for the public budgets for education, health and the promotion of important social programs in Brazil. The Brazilian legislature has adopted this radical measure as a way to deal with fiscal deficits that, according to most of the representatives, were reaching problematic levels due to the Brazilian economic crisis. The following sections argue that Brazilian authorities should review the adoption of CA 95 due to the incompatibility between the domestic austerity measures and national and international human rights law. The necessity to review this specific constitutional amendment derives from the lack of a legal basis and its disproportionate effects in light of other alternatives available to bring Brazil back to fiscal health. These reasons will be addressed in the following section. Then, this chapter will argue how weak inter-American judicial review

[886]For instance, it allowed that pregnant women could be exposed to unhealthy conditions at work.
[887]See the text of the amendment (available only in Portuguese) at: https://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc95.htm.
[888]See: Shannon Sims, "Brazil Passes the Mother of All Austerity Plans," The Washington Post, December 16, 2016, available at: https://www.washingtonpost.com/news/worldviews/wp/2016/12/16/brazil-passes-the-mother-of-all-austerity-plans/?utm_term=.8d2b0771678a.

might be useful as a remedy for the substantial violations of socioeconomic rights brought about by CA 95 within domestic law.

7.2.1. The lack of a legal basis according to national and international human rights law

Within national law, the adoption of CA 95 represents a severe underenforcement of the 1988 constitution. Due to its consequences, Yaniv Roznai and Letícia Kreuz have referred to CA 95 as an example of an "unconstitutional constitutional amendment."[889] For them, CA 95 should be reviewed for violating Art. 60 (4) of the Brazilian constitution, which establishes the unamendable character of some constitutional features. They have argued that CA 95 violates the state's federalist form of government and several fundamental rights.[890] The violation of federalism is due to the derogation of the states' capacity for self-organization, self-government and self-administration. The violation of fundamental rights is related to the prohibition, according to Art. 60 (4), of the abolishment of individual rights and guarantees. This involves the interpretation that socioeconomic rights are included under the catalogue of fundamental rights and, therefore, unamendable within Brazilian law.

Richard Albert has referred to CA 95 as an example of "constitutional dismemberment."[891] For him, constitutional dismemberment occurs when constitutional amendments represent "self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations."[892] Albert has claimed that, based on the impact on the next generation's enjoyment of socioeconomic rights and on the incompatibility with core constitutional norms, CA 95 represents "more than a simple amendment. Its purpose and effect suggest that it should instead be called a constitutional dismemberment."[893] CA 95 has, in fact, introduced a disruptive fiscal policy that has severe consequences for the normative force of the 1988 constitution as a social welfare document.

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[889]Yaniv Roznai, Letícia Regina Camargo Kreuz, "Conventionality Control and Amendment 95/2016: a Brazilian Case of Unconstitutional Constitutional Amendment," Revista de Investigações Constitucionais 5, no. 2, (2018), 35-56.
[890]Ibid, 42.
[891]Richard Albert, "Constitutional Amendment and Dismemberment," Yale Journal of International Law 43, no. 1, (2018), 1-84.
[892]Ibid, 2-3.
[893]Ibid, 42.

Socioeconomic rights are mentioned in several parts of the Brazilian constitution. Its preamble establishes that the state commits itself to ensuring the exercise of social rights.[894] Art. 3 (III) establishes the following core aims of the current constitutional order: the eradication of poverty and substandard living conditions, and the reduction of social and regional inequalities.[895] Furthermore, the constitution lists several socioeconomic rights especially under Chapter II of its Tittle II, including, for instance, the rights to work, food and housing.[896] The constitution also ensures the right to public healthcare,[897] social security,[898] education,[899] and culture.[900] Due to the violation of all these fundamental rights protected by the Brazilian constitution, national authorities should regard CA 95 as an unconstitutional constitutional amendment and, therefore, review its adoption within domestic law.

CA 95 should also arguably be reviewed for being incompatible with international human rights law. This incompatibility was first described by international human rights organizations that followed the debate around the project of this constitutional amendment. The UN Committee on Economic, Social and Cultural Rights (CESCR), for instance, expressed concern with and questioned the legitimacy of the severe Brazilian austerity measures. For Philip Alston, the Special Rapporteur for Extreme Poverty and Human Rights, CA 95 "has all the characteristics of a deliberately retrogressive measure", since the "federal spending cap will undoubtedly result in retrogression with regard to the realization of economic and social rights."[901] It is worth addressing how the adoption of CA 95 represents a violation of the duty of progressive development with regard to socioeconomic rights.

The progressive development obligation is part of several international human rights documents. According to Art. 26 ACHR, state parties undertake to adopt measures to achieve

[894]Brazilian Constitution, preamble.
[895]Brazilian Constitution, art. 3 (III).
[896]"Education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, in accordance with this Constitution." Brazilian Constitution, art. 6.
[897]Ibid, arts. 196-200.
[898]Ibid, arts. 203-204.
[899]Ibid, arts. 205-214.
[900]Ibid, arts. 215-216 (A).
[901]See: Philip Alston, "Brazil. Some Reflections on Brazil's Approach to Promoting Austerity Through a Constitutional Amendment. Remarks Prepared for Presentation at a Colloquium on Constitutional Austerity, São Paulo, October 3, 2017, available at: http://www.ohchr.org/Documents/Issues/Poverty/Austeritystatement_Alston3Oct2017.pdf. See also: OHCHR, "20-Year Public Expenditure Cap Will Breach Human Rights, UN Expert Warns," available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006.

the progressive full realization of the socioeconomic rights established by the OAS Charter.[902] The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) establishes in its Art. 2 (1) that state parties undertake "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of" socioeconomic rights.[903] Moreover, the progressive development obligation is part of the Protocol of San Salvador, which establishes a similar provision to the one in the ICESCR.[904]

For Tara J. Melish, the duty of progressive enforcement implies at least three immediate obligations: i) the obligation to plan the progressive realization of socioeconomic rights, ii) the duty to execute this plan with due diligence and in good faith, and iii) the duty of not taking retrogressive measures that bring about the underenforcement of these rights.[905] She has claimed that "[j]ust as a State Party has the obligation to take progressive measures, it has an obligation not to take regressive measures. Thus, at the most basic level, the duty of progressivity is a prohibition of regressivity."[906] International organizations have also shared this interpretation and considered the duty of refraining from the adoption of retrogressive measures as one of the consequent obligations that derives from the progressive enforcement of socioeconomic rights.

Although the CESCR has claimed that "the full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time,"[907] it also claimed that this does not mean that the progressive development obligation is irrelevant.[908] With regard to the relationship between progressive development and the prohibition on adopting retrogressive measures, the CESCR established that "any deliberately retrogressive

[902]ACHR, art. 26.
[903]ICESCR, art. 2 (1).
[904]"The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol." PSS, art. 1.
[905]Tara J. Melish, Protecting Economic, Social and Cultural Rights in the Inter-American System: A Manual on Presenting Claims, (Quito: Centro de Derechos Económicos y Sociales, 2002), 175.
[906]Ibid, 191.
[907]CESCR, "The Nature of States Parties Obligations, General Comment No. 3", December 14, 1990, U.N. doc E/1991/23, available at: https://www.refworld.org/pdfid/4538838e10.pdf.
[908]The CESCR established that the progressive development obligation "must be read in the light of the overall objective, indeed the raison d'être, of the Covenant, which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal." Ibid, §9.

measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights of the Covenant and in the context of the full use of the maximum available resources."[909]

According to Art. 4 ICESCR, limitations to the enjoyment of socioeconomic rights should be determined by law "only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[910] There is a similar provision in Art. 5 of the Protocol of San Salvador ("Scope of Restrictions and Limitations").[911] Still, according to the Limburg principles of implementation of the ICESCR, the progressive development obligation is independent of increasing economic resources, since it is still possible to fulfil it by using resources more effectively.[912] As applied to the case of CA 95, limitations on socioeconomic rights based on the argument that state authorities must cope with fiscal deficits caused by a macroeconomic crisis are not in accordance with the international human rights regime on these rights, as Philip Alston has also noted.[913] State authorities have a duty to justify the adoption of restrictions and limitations on socioeconomic rights. The argument that an economic crisis demands a new fiscal regime that is against enforcing these rights does not suffice. Consequently, we may ask how fiscal policies relate to human rights enforcement within domestic law.

For the IACHR, fiscal policies should be established based on the fundamental principles of participation, accountability, transparency and access to information.[914] The IACHR also listed particularly relevant principles for fiscal policy from a human rights perspective: the guarantee of essential minimum levels, mobilization of the maximum amount of resources available for the progressive realization of socioeconomic rights, the non-regressive nature of these rights and the principles of equality, and non-discrimination.[915] As some critics have noted, the Brazilian legislature did not invest much time in the discussion

[909]Ibid.
[910]ICESCR, art. 4.
[911]"The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights;" PSS, art. 5.
[912]See the principle mentioned at §§ 21-28 in "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights," Human Rights Quarterly 9, (1987), 122–135.
[913]"The mere invocation of an economic or fiscal crisis does not set aside the international human rights regime." Alston, Some Reflections on Brazil's Approach, 2.
[914]IACHR, Report on Poverty and Human Rights in the Americas, September 7, 2017, §501, available at: http://www.oas.org/en/iachr/reports/pdfs/Poverty-HumanRights2017.docx.
[915]Ibid, §502.

about the adoption of CA 95 and about the severe consequences this amendment could bring about within domestic law.[916] In fact, CA 95's adoption by the Brazilian legislature occurred in a very hasty and anti-democratic way. There was no effort from the part of the government or the legislature to inform civil society about the possible effects of CA 95. Debates on its adoption took place in Congress and they did not enable the active participation of civil society.[917] Moreover, Mr. Temer had only come to power as a result of the impeachment of the former Brazilian president, Ms. Rousseff. This means that there was practically no ordinary democratic mandate by the people in support of the austerity measures introduced by his government.[918] Due to the context of adoption of this amendment, the Brazilian authorities have violated several principles relating to the necessary transparency with regard to fiscal policies from the perspective of international human rights law.

It is also worth mentioning that the United Nations Human Rights Council (OHCHR) has recently established guiding principles on how states should address the human rights impact of economic reforms.[919] According to it, human rights "should guide all efforts to design and implement economic policies," based on the principle that "the economy should serve the people, not vice versa."[920] Most importantly, the OHCHR established that countries should promote impact assessments in order "to prevent adverse human rights impacts of economic reforms."[921] EC 95 violates several of the OHCHR's guiding principles, which this study explains in the following.

Principle 2 establishes the obligation to abide by international human rights law when adopting economic policies. The OHCHR has pointed out that "in times of economic and financial crisis, States' efforts are often directed at trying to stabilize the economy," which often "comes with risk of disregarding their human rights obligations with regard to those who suffer

[916]This point of CA 95's procedural illegitimacy has been first raised by Philip Alston. See: Alston, Some Reflections on Brazil's Approach, 7-8.
[917]For Philip Alston, "engagement with civil society was rather limited and did not include a wide range of different civil society organizations and groups. According to my information, debates on EC-95 mostly took place in Congress and there was limited scope for civil society to be involved in discussions or debates on the matter." Ibid, 8.
[918]Alston has pointed to the "the fact that the present Government came into office after the impeachment of the previous President and has not been able to obtain a specific mandate from the electorate for its program of fiscal consolidation, which runs contrary to the platform on which the Government had been elected." Ibid, 7. He was referring in this passage to the previous government of Ms. Rousseff, who was elected due to her affiliation to the Workers' Party (a traditional defender of socioeconomic rights enforcement).
[919]OCHRH, Guiding Principles on Human Rights Impact Assessments of Economic Reforms, December 19, 2018, available at: https://digitallibrary.un.org/record/1663025?ln=en#record-files-collapse-header.
[920]Ibid, preamble, §2.
[921]Ibid, preamble, §7.

most from the economic crisis."[922] Given this usual practice, the OCHRH established that fiscal policies "must not lead to sacrificing international human rights obligations," and that states "should undertake full assessments of the potential impacts of fiscal discipline policies in different national and subnational contexts before committing to such policies."[923]Moreover, states should guarantee the participation of all affected individuals and groups in the adoption of economic reforms.[924]

Under Principle 9, the OHCHR addressed the progressive realization of socioeconomic rights and established that "states are obliged to establish fiscal policies that aim at the realization of human rights."[925] Moreover, states should prove that "every effort has been made to mobilize all available resources, even in times of economic crisis,"[926] to progressively enforcing socioeconomic rights. Still according to the OHCHR, the progressive enforcement obligation involves the states' obligations to tackle tax evasion and avoidance, ensure a progressive tax system, and reprioritize expenditures to ensure the adequate funding of public services.[927] Finally, the OHCHR established that states should in principle abide by the minimum core obligations regarding the protection of socioeconomic rights. Exceptions to this rule are allowed only if states demonstrate that every effort has been made to use all resources that are at their disposal to the progressive enforcement of these rights.[928]

Based on the international documents mentioned above, there is a strong presumption of the inadmissibility of retrogressive measures with regard to socioeconomic rights as a consequence of the progressive development obligation. According to the OCHRH's guiding principles, retrogressive measures are considered prima facie violations of socioeconomic rights.[929] In line with this, state must prove that these retrogressive measures are i) temporary, ii) legitimate, iii) reasonable, iv) necessary, v) proportionate, vi) non-discriminatory, vii) protective of the minimum core content of socioeconomic rights, vii) based on transparency and genuine participation of affected groups, and viii) subject to meaningful review and

[922]Ibid, §2.3.
[923]Ibid, §2.5.
[924]Ibid, §7.3.
[925]Ibid, §9 (a).
[926]Ibid, §9 (b).
[927]Ibid, §9.3.
[928]Ibid, §9.5.
[929]Ibid, §10.

accountability procedures.[930] The adoption of EC 95 by the Brazilian national legislature did not abide by the majority of the principles above mentioned.

Given the fact that international law imposes a high burden of proof in the adoption of retrogressive measures, there is a remaining question with regard to the judicial review of CA 95: does this amendment concretely represent a retrogressive measure? This relates to the concrete effects of CA 95 within domestic law, which this study will now describe.

Few reports have been written on the effects of CA 95 and most of them are focused on its impacts on the most socially vulnerable groups in Brazil. According to a factsheet issued by three different organizations (COI factsheet hereinafter),[931] on its first anniversary, CA 95 "has already begun to disproportionately affect disadvantaged groups, such as Afro-Brazilian women and people living in poverty."[932] This report mentioned that, since its adoption, "significant resources have been diverted from the most important social programs towards debt service payment, threatening to exacerbate the extreme levels of economic inequality" in the country.[933] Based on CA 95, the Brazilian government has established "pro-cyclical budget cuts principally targeting investments in human rights, social protection, climate change, and racial and gender equality."[934] Moreover, the enforcement of CA 95 might significantly reduce key investments in health, education and public programs in the future. The budgetary impacts of CA 95 during the 2017 fiscal year illustrate this more clearly.

The share of health and education spending within the federal budget dropped 17% and 19% respectively. The government has also reduced funding for food security programs. One of the consequences has been the budget cuts of the Food Acquisition Program, which links small-scale farmers to food-insecure households and children (32% cut in 2017 if compared to the 2014 budget). The COI factsheet mentioned that especially small-scale farmers from the poorest northern regions of Brazil have been deprived of this social benefit. The drastic cuts to food programs and tax transfer programs may lead to hunger and malnutrition among the poorest Brazilians. Moreover, austerity measures have dismantled institutions that ensure

[930]Ibid, §10 (a-i).
[931]They are: The Center for Economic and Social Rights (CESR), Oxfam Brazil and the Institute for Socioeconomic Studies (INESC).
[932]See: CESR, Oxfam, INESC "Brazil. Human Rights in Times of Austerity," 1, available at: http://www.cesr.org/factsheet-brazils-human-rights-advances-imperiled-austerity-measures.
[933]Ibid, 4.
[934]Ibid.

gender equality in Brazil. Social programs that were created to strengthen women's autonomy, and provide services for women in violent situations, suffered major cuts in 2017 (only R$ 32,2 million released out of R$ 96,5 million initially set in the federal budget). As a consequence, several women's rights programs have been undercut. The number of specialized services offered to women suffering from violence has already been reduced by 15% as a result of budget cuts.

CA 95 widens social inequality in Brazil and it does not promote any good to the poorest Brazilians. In contrast, its enforcement causes a considerable change in the distribution of wealth in the country at the expense of the worst-off Brazilians, which can also be illustrated by the impact of the new fiscal regime on another vulnerable social group: black women. Black women represent a traditionally underprivileged group in Brazil that is disproportionately affected by Brazil's regressive tax system, given that the richer the tax payer is in Brazil, the lower the real tax rates are.[935] Despite the fact that the Brazilian fiscal regime is traditionally deeply unfair to the poorest, CA 95 exacerbates the impact of this unfair fiscal policy on the poor black female population. Based on the consequences of CA 95 for poor black women in Brazil, the adoption of this new fiscal regime could even be considered a type of discrimination against this historically underprivileged social group.

The COI factsheet rightly concluded that "austerity, and CA 95 in particular, is not a plan for fiscal stabilization, but an assault on the human rights of Brazilians, particularly women, blacks and others at greatest risk of poverty," which has increased social and economic inequality in Brazil.[936] The adoption of CA 95 has represented a clear underenforcement of socioeconomic rights under national and international law. Its enforcement has been implemented within a very controversial macroeconomic agenda at the expense of the normative force of the Brazilian constitution and of many international documents on socioeconomic rights. Brazilian authorities have especially ignored the international obligation to refrain from the adoption of retrogressive measures with regard to socioeconomic rights or to provide justifications for said measures.

When adopting CA 95, national authorities also ignored other alternatives available to ensure fiscal health without necessarily cutting social spending in such a drastic way. Some of

[935]Ibid, 3.
[936]Ibid, 7.

the alternatives involve maintaining the level of public spending and supporting it by other means. According to an IMF public policy paper, the impact of fiscal consolidations on public spending can be reduced by the greater reliance on wealth and property taxes, more progressive income taxations and combatting abuses like tax avoidance and evasion.[937] These alternatives are legitimate ways to cope with the fiscal crisis and they also seem to be much more effective in countries like Brazil. Still according to the IMF, one recent report makes it clear that austerity measures *per se* will not bring the country back to fiscal health.[938]

National authorities have traditionally ignored these efficient measures of improving fiscal health. Besides the provision of a wealth tax in the Brazilian constitution,[939] for instance, the Brazilian legislature has still not turned it into reality by means of more concrete legislation, which brings about a significant loss of resources that could be used for social spending. Moreover, as the COI factsheet has also pointed out: "Brazil is one of the few countries worldwide that does not tax the dividends paid by corporations to their shareholders."[940] This reduces the taxes paid by the (super-)rich Brazilians, while it places a heavy burden on the poor and the middle class. The fight against tax abuses could also provide significant resources for public spending and be used as a measure to avoid cuts in the budgets for education, health and other important social programs.

Due to several alternatives available, the Brazilian authorities should seek other tax sources in order to cope with fiscal deficits. The Brazilian legislature has not demonstrated the necessary and proportional character of CA 95 in light of these other alternatives available. Fiscal deficits must not necessarily lead to the abolishment of policies that promote the enforcement of socioeconomic rights. These policies represent ultimately the enforcement of the 1988 constitution as a social welfare document. They also ensure the effectiveness of international human rights law with regard to the protection of socioeconomic rights within domestic law. CA 95 brings about far reaching consequences for the normative force of

[937]IMF, Policy Paper: Fiscal Policy and Income Inequality, January 23, 2014, available at: https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Fiscal-Policy-and-Income-Inequality-PP4849.
[938]IMF, "Country Report: Brazil," 2018, available at: https://www.imf.org/en/Publications/CR/Issues/2018/08/03/Brazil-2018-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-46154.
[939]"The Union has the power to levy taxes on: large fortunes, as provided in a complementary law." Brazilian Constitution, art. 153 (VII).
[940]CESR, Oxfam, INESC, "Brazil. Human Rights in Times of Austerity," 3.

domestic and international human rights law on socioeconomic rights and therefore it should be judicially reviewed by the IACtHR.

7.2.2. The weak inter-American judicial review of CA 95

Inter-American judicial review is a possible way of ameliorating the violations of national and international human rights law that CA 95 has brought about. Before addressing the reasons why weak international judicial review is the best approach that the IACtHR can adopt in this case, it is worth mentioning that this constitutional amendment has first to be reviewed by the Brazilian constitutional court. The validity of the amendment was already contested within the domestic system of constitutional review.[941] The Brazilian STF already addressed a writ that intended to suspend the discussion of the project of this amendment by the national legislature. The Justice Rapporteur did not suspend the discussion of the amendment in the National Congress. According to Judge Luis Roberto Barroso, the judiciary should only suspend the discussion of any matter of public interest due to extreme circumstances.[942]

He did not find any violation of Art. 60 (4) of the Brazilian constitution, which refers to the unamendable constitutional features, and, more specifically, rejected a violation of fundamental rights. For him, "the open and vague nature of the principles protected by the unamendable clauses gives courts an enormous power, which includes defining the very content of the 'essential core,' 'basic structure' or 'identity' of the constitution."[943] He claimed that democracy demands that courts adopt self-restraint by practicing the judicial review of constitutional amendments based on the unamendable clauses due to the fact that "amendments to the constitution are adopted through a more difficult process, which normally requires the formation of large majorities, so that they enjoy a high degree of democratic legitimacy and presumption of constitutionality."[944]

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[941]Brazilian STF, (Provisional Measure within a Writ by Judge Luis Roberto Barroso), Case of *MS 34.448 DF*.
[942]Ibid, §16. This approach has been common practice within Brazilian constitutional court's jurisprudence. Virgílio Afonso da Silva has claimed that "there seems to be no decision that has ever blocked deliberations in Congress" based on the argument that a constitutional amendment goes against an eternal clause of the Brazilian constitution; Virgílio Afonso da Silva, The Constitutional of Brazil. A Contextual Analysis, (Oxford et al, Hart Publishing, 2019), 93-94.
[943]Brazilian STF, (Provisional Measure within a Writ by Judge Luis Roberto Barroso), Case of *MS 34.448 DF*, §34.
[944]Ibid, §35.

According to Art. 46 ACHR ("Subsidiarity Principle"), the existence of domestic writs against the validity of the new fiscal regime is a factor that limits the authority of the IACHR and of the IACtHR to order the review of CA 95. However, this should not prevent us from analyzing the most appropriate form of international judicial review that the IACtHR could adopt if the Brazilian authorities do not invalidate CA 95. As this chapter has demonstrated in the previous section, the incompatibility between CA 95 and inter-American human rights legislation and jurisprudence is clear. It is now worth addressing how the IACtHR could review CA 95 in a different way than by practicing the strong judicial review of this amendment. This practical test can prove the arguments in favor of the advantages of weak review for inter-American human rights jurisprudence. In the following, it is worth addressing how the inter-American institutions should proceed with the weak inter-American review of CA 95.

The weak international review of CA 95 involves, first, the analysis of the case by the IACHR. This first step is more related to the political stage of review within the IAS. The IACHR authorities should encourage the Brazilian authorities, more specifically the Brazilian legislature, to review CA 95 according to national and international human rights legislation and jurisprudence on socioeconomic rights. The IACHR has quasi-judicial authority within the IAS and it can reach a friendly settlement with the Brazilian authorities before referring CA 95 to the IACtHR for review. In fact, the IACHR has already addressed the disproportionate effects of CA 95 as a measure to ensure fiscal responsibility in Brazil.

After its most recent visit to the country in 2018,[945] the IACHR claimed that the government's harsh austerity measures violate the country's legal obligations under inter-American human rights law. In its preliminary report on this visit,[946] the IACHR pointed to the historical roots of poverty and inequality in Brazil, as well as to their multidimensional nature and their effects on particular groups in society (Afro-descendant and indigenous persons for instance). According to the commission, the "current fiscal policy measures do not seem to be aimed at changing such conditions."[947] The IACHR also pointed to the contradiction between CA 95 and the Brazilian constitution, which has as its goals the eradication of poverty and marginalization and the reduction of social and regional inequalities. For the IACHR, CA 95

[945]IACHR, Press Release, "IACHR Concludes Visit to Brazil," November 12, 2018, available at: https://www.oas.org/en/iachr/media_center/preleases/2018/238.asp.
[946]IACHR, "Preliminary Observations of IACHR's In Loco Visit to Brazil," November 12, 2018, available at: https://www.oas.org/es/cidh/prensa/comunicados/2018/238OPeng.pdf.
[947]Ibid, 3-4.

could lead to the adoption of measures with a "negative impact on the effective enjoyment of the rights to housing, healthcare and education."[948] This could provide "a setting that does not seek to reduce social inequalities but rather to deepen and perpetuate them."[949]

The IACHR also reported that it had obtained information about the enforcement of CA 95 and its serious impact on vulnerable groups and on groups that have suffered historical discrimination in Brazil. With regard to indigenous people, the IACHR reported that FUNAI, which is the national institution for indigenous rights in Brazil, had suffered budget cuts and that its staff were experiencing inadequate working conditions.[950] The IACHR also mentioned the risk of Brazil returning to FAO's "hunger map."[951] With regard to the human rights situation of poor and homeless people in Brazil, the IACHR concluded that, with the adoption of CA 95, "Brazil's constitution no longer applies substantial differentiation to ensure public policies aimed at reducing extreme poverty and improving the living conditions of homeless people and favela dwellers."[952] Based on all these consequences that CA 95 has for the enforcement of socioeconomic rights at the domestic level, the IACHR recommended that Brazil refrain from adopting measures that are regressive with regard to these rights.[953]

If this first political phase of inter-American human rights protection does not lead to the political review of CA 95 by the national legislature, the IACtHR should initiate the judicial phase of inter-American review. Yaniv Roznai and Letícia Kreuz have mentioned conventionality control as the most appropriate remedy for CA 95 and seem to advocate for the practice of strong international judicial review of this constitutional amendment.[954] By contrast, this study argues that the IACtHR should limit its judicial authority to the practice of weak review of CA 95, given that this piece of legislation primarily affects socioeconomic rights within domestic law. There are good reasons for practicing weak inter-American judicial review in this case. They include the general advantages of weak judicial review for cases relating to

[948]Ibid, 4.
[949]Ibid.
[950]Ibid, 7.
[951]Ibid, 20.
[952]Ibid, 23.
[953]Ibid, 52.
[954]For them, "the Brazilian New Tax Regime violates compromises ratified by the country not only on a global level, but also on a regional one. The judicial control of conventionality advocated by the Inter-American Court appears as a legal mechanism by which judges invalidate rules of hierarchy inferior to the convention, which have not been dictated in conformity with it, taking into account not only the Convention itself, but interpretation made by the Inter-American Court." Yaniv Roznai, Letícia Kreuz, Conventionality Control and Amendment 95/2016, 48-49.

socioeconomic rights that have been mentioned in the last chapter. There are also specific advantages of the weak inter-American judicial review of CA 95, which we will now discuss.

Although the adoption of CA 95 was inappropriate, it is important to remember that Brazil has been under a macroeconomic crisis in the last years. This has had severe consequences for the public budget, which relies on different tax sources that have suffered due to the economic recession. According to domestic law, the body with power to establish fiscal policies is the Brazilian legislature. Given this fact, the Brazilian legislature is also the most competent authority to review the adoption of CA 95. This situation makes the argument in favor of weak inter-American judicial review even more compelling. How could the IACtHR practice the strong review of an amendment regarding public spending when the court lacks the appropriate knowledge of all the different issues relating to domestic fiscal policies? How could the IACtHR, with its current institutional capacity, replace the much more substantial domestic institutional apparatus when it comes to the discussion of fiscal policies? Based on these inherent restrictions of the institutional character of the IACtHR as a regional human rights court, the most legitimate and effective way of reviewing CA 95 is by means of weak inter-American judicial review.

According to weak review decision-making, the IACtHR should establish the incompatibility between CA 95 and inter-American human rights law and refer the final say on the new fiscal regime back to the Brazilian legislature. However, weak judicial review is not intended to have just a symbolic dimension in this case. In this declaration of incompatibility, the IACtHR can make the Brazilian legislature aware of the blind spots and burdens of inertia relating to the adoption of CA 95. The blind spots in the case of CA 95 refer to the far-reaching consequences that the enforcement of this amendment has for the enjoyment of socioeconomic rights in Brazil. The burdens of inertia refer to the fact that the national legislature has long ignored essential means for establishing fiscal policies like the adoption of wealth and property taxes, and of more progressive income taxations. The IACtHR can address all these appropriate measures that prove that the adoption of CA 95 was not necessary and therefore does not represent a legitimate restriction of the enjoyment of socioeconomic rights within domestic law.

Given that weak judicial review is intended to promote more inter-institutional interaction with regard to legislation on socioeconomic rights, the IACtHR should closely monitor compliance with the amendment of the Brazilian new fiscal regime. Monitoring

compliance with the judgement is an effective means to keep the interaction between national and inter-American authorities. National authorities are supposed to respond to the declaration of incompatibility between CA 95 and the ACHR in a reasonable time. They should not postpone the review of CA 95 and tolerate the consequences of this amendment for the enjoyment of socioeconomic rights. In line with this, the national legislature should have the final say on a new fiscal regime that is not offensive to socioeconomic rights and deliberate over it as soon as possible, given the far-reaching consequences of the current fiscal regime.

In conclusion, the IACtHR should, based on all arguments presented above, avoid establishing the state authorities' duty to practice conventionality control of CA 95. The court should limit the practice of strong review of domestic pieces of legislation that are flagrantly offensive to the civil and political rights protected by the ACHR. This could ensure that the practice of strong inter-American judicial review becomes more consistent. Moreover, CA 95 could be the best opportunity to introduce weak judicial review into inter-American human rights jurisprudence. Weak judicial review could transform inter-American jurisprudence and make it fit to face the current challenges of human rights enforcement in Latin America, which are increasingly related to the protection of socioeconomic rights.

7.3. Conclusion: The legitimacy and effectiveness of mixed-form inter-American judicial review for Brazilian constitutionalism

The 1988 Brazilian constitution emerged within the Latin American human rights enforcement context, the most remarkable feature of which is systematic state-perpetrated human rights violations. Not surprisingly, Brazilian constitutionalism shares with other Latin American countries the same problems with regard to authoritarianism and material inequality. This is most evident when we look at domestic legislation. The validity of the Brazilian amnesty law and the adoption of CA 95 are evidence of how Brazilian authorities have been unable to change this context of systematic human rights underenforcement. In fact, these laws show how domestic law can be instrumentalized by national authorities and help perpetuate the persistently illiberal practices. This final chapter has argued that mixed-form theory could be an alternative for the IACtHR when dealing with cases like these Brazilian laws. This theory intends to offer the most legitimate and effective approach to reviewing domestic legislation that is inconsistent with inter-American human rights law. In this chapter, the main task was to

demonstrate the practical value of mixed-form inter-American judicial review for Brazilian and Latin American constitutionalism.

The enforcement of the Brazilian amnesty law attests to the Brazilian authorities' enduring tolerance of authoritarianism. Given that Brazil has experienced several periods of authoritarianism, we may even claim that these authorities have a particular willingness to rule in an authoritarian way. As Chapter II has explained, the amnesty law was contested within the domestic system of constitutional review established by the 1988 constitution. Despite the fact that the amnesty law violates national and inter-American human rights law, the highest Brazilian judicial authorities established its constitutionality within domestic law. These same judicial authorities adopted a controversial interpretation of issues relating to transitional justice and did not offer justifications for not adopting inter-American jurisprudence on this matter. In fact, they practically ignored the evolution of inter-American legislation and jurisprudence with regard to the protection of civil and political rights within the IAS.

According to mixed-form inter-American judicial review, the conventionality control of the Brazilian amnesty law was legitimate, given that this domestic statute flagrantly violates the civil and political rights established by the ACHR and other inter-American human rights documents. Most importantly, the enforcement of the Brazilian amnesty law violates inter-American human rights jurisprudence, because the IACtHR has consistently invalidated the adoption of domestic amnesty statutes that were adopted by authoritarian governments as a means to avoid punishment. After the establishment of new democracies, the national authorities of several Latin American countries enforced inter-American human rights jurisprudence on amnesty laws and guaranteed its effectiveness within domestic law. This converging approach has arguably become customary regional human rights law within the IAS.

The adoption of inter-American jurisprudence had consequences for the further evolution of constitutionalism in some Latin American countries. Several human rights violations committed during the dictatorships were later prosecuted by national authorities. This illustrates the consistent enforcement of inter-American human rights law within domestic law. This consistent enforcement has also led to a different interpretation of the authoritarian eras in these countries. While in Argentina, for instance, civil society now sees the military dictatorship in a very critical way, many Brazilians do not share this critical perspective on past military

government.[955] In this context, it is no surprise that Brazil is again facing the same problems with authoritarian rule. As some may say, those who ignore their past are doomed to repeat it. It is true that blaming the amnesty law for the election of Mr. Bolsonaro would be an overstatement. However, it is not wrong to affirm that this law is part of an inconsistent approach to human rights enforcement within Brazilian law. A different approach could help in the battle against the traditional illiberal practices within domestic law that have historically ended up in authoritarian rule.

In view of this, national authorities should adopt a different approach. The Brazilian authorities, more specifically the judges in the Brazilian constitutional court, should practice the strong judicial review of the Brazilian amnesty law. This is, in fact, a normative argument based on the legitimacy of conventionality control of amnesty laws within the IAS. Due to the consistent implementation of the strong inter-American judicial review of amnesty laws by Latin American authorities, the Brazilian judicial authorities are also obliged to invalidate the domestic amnesty law. If they maintain their current and inconsistent interpretation that the amnesty statue is valid within domestic law, they are clearly underenforcing the ACHR and also the 1988 cosmopolitan constitution. Underenforcing the constitution is not what the constitutional court is meant to do. The Brazilian STF judges should therefore adopt inter-American jurisprudence on the amnesty statute and consistently enforce inter-American human rights law within domestic law. By doing so, they can send the appropriate message to the international community that the Brazilian state is committed to human rights enforcement in a consistent way.

The adoption of CA 95, in turn, illustrates the traditional systematic underenforcement of socioeconomic rights within Brazilian law. This constitutional amendment was adopted in response to the macroeconomic crisis that Brazil has been experiencing since 2015. CA 95 introduced a 20-year public spending freeze, which is currently deeply affecting areas like education, health, and social programs. In past decades, public policies in these areas helped millions of Brazilians to rise out of poverty. By freezing public spending in these areas, the national authorities, more specifically the national legislature, find themselves on the wrong side of the battle for consistent human rights enforcement within domestic law.

[955]This is not only related to the fact that the Argentinian dictatorship was much more violent than the Brazilian one. On this issue, see: Kathryn Sikkink, The Justice Cascade. How Human Rights are Changing World Politics, (New York: W.W. Norton & Company, 2011).

CA 95 has introduced a disruptive fiscal regime into the 1988 constitutional order. This amendment has correctly been described by legal scholars as an *unconstitutional constitutional amendment*, or even as a serious *constitutional dismemberment*. CA 95 endangers the normative force of the 1988 constitution, which was intended to be a social welfare document according to its preamble and extensive catalogue of socioeconomic rights. Beyond being incompatible with the 1988 constitution, CA 95 violates the progressive enforcement obligation, which is established by several international documents on socioeconomic rights. The duty of refraining from the adoption of retrogressive measures is a consequence of this progressive development obligation. This leads to a strong presumption against the adoption of measures that bring about the retrogressive enforcement of socioeconomic rights. According to this strong presumption, national authorities should prove why the retrogressive measures were the only means available. As this chapter has demonstrated, this did not occur in the case of CA 95, given that the Brazilian legislature ignored alternative measures that could be even more effective than the adoption of this constitutional amendment to cope with the fiscal crisis.

Despite the severe violations of inter-American human rights law that CA 95 brings about, this chapter has argued that the IACtHR should practice weak inter-American judicial review of this amendment if it has the opportunity to adjudicate on this matter in the future. This argument is based on the notion that weak judicial review offers a better form of decision-making for the judicial enforcement of socioeconomic rights. This form of decision-making also promotes greater dialogue between inter-American and national authorities with regard to the immediate highly complex issues inherent in the Brazilian fiscal crisis. The adoption of CA 95 was arguably not the most appropriate form of dealing with this crisis. However, the Brazilian national legislature is the most legitimate and capable institution to establish domestic fiscal policies that are coherent with national and international human rights law. By practicing weak review in this case, the IACtHR can make national authorities aware of the severe violations of inter-American human rights law that CA 95 has brought about and remind them of their duties to address the blind spots and burdens of inertia within domestic law. These problematic issues are also responsible for the current fiscal deficit. Together, national and inter-American institutions may find a better way to resolve the systematic underenforcement of socioeconomic rights represented by the adoption of CA 95.

The Brazilian laws analyzed above strengthen the argument that mixed-form theory is the most appropriate form of inter-American judicial review. This attests to the usefulness of

mixed-form review for inter-American human rights jurisprudence. Similar to Brazil, other Latin American countries may face fiscal crises and national authorities may adopt legislation that violates inter-American law on socioeconomic rights. The court should avoid practicing strong inter-American judicial review in these cases. However, in cases where authoritarian laws that flagrantly violate inter-American documents are passed, like the cases involving amnesty laws, the IACtHR can legitimately practice conventionality control and order their amendment within domestic law.

Conclusion

Against the Insular Evolution of Constitutionalism: The Latin American Path to Global Constitutionalism

Cosmopolitan constitutionalism refers to the emergence of a new context for human rights enforcement in Latin America. Elements of positive human rights law established by domestic and inter-American authorities have strengthened the relationship between national and international law within the IAS. These top-down and bottom up elements of cosmopolitan constitutionalism were described in Chapter I. From the top-down perspective, it was worth mentioning that the organizational evolution of the IAS has strengthened the authority of human rights law within Latin American constitutionalism. The bottom-up elements include mostly new constitutional texts adopted by national legislatures and innovative constitutional interpretations held by the most authoritative domestic courts. These bottom-up and top-down elements have granted a cosmopolitan character to human rights enforcement in Latin America.

In this new context, the normative questions associated with the inter-institutional interaction between domestic and international authorities have become more difficult to address. The practice of inter-American judicial review of domestic legislation illustrates this fact. This study has started addressing the specific questions related to international judicial review by analyzing the invalidation of the Brazilian amnesty law by the IACtHR in Chapter II. This chapter has served to illustrate the cosmopolitan relationship between national authorities and the IACtHR. Most importantly, it has illustrated the resistance of a domestic constitutional court to the practice of strong inter-American judicial review. After examining the resistance of the Brazilian constitutional court to abiding by the inter-American judicial review of the amnesty statute, in Chapter III, this study has described the specific forms of strong international judicial review developed by the IACtHR throughout inter-American human rights jurisprudence: conventionality control and the direct enforcement of socioeconomic rights.

In this study, it was my task to try to find the most appropriate approach to how inter-American judicial review can become an ally of global constitutionalism in Latin America.

Based on this task, Chapter IV has assessed the normative grounds for the practice of strong international judicial review. This chapter first addressed theories that have tried to offer reasons for the practice of strong judicial review within domestic law. These approaches are also useful for the discussion of international judicial review due to the common feature of inter-institutional interaction, which is present within both domestic and international variants of judicial review. When focusing on inter-institutional interaction, legal scholars can better analyze the legitimacy and effectiveness issues that are associated with the practice of judicial review. Due to these legitimacy and effectiveness issues, a common feature of theories that have intended to weaken the judicial authority of the IACtHR has been their mention to the principle of subsidiarity. Legal authorities and scholars have usually invoked the principle of subsidiarity in order to weaken the practice of inter-American judicial review.

The European margin of appreciation has been the most frequently mentioned concept within this debate. Some scholars have argued that the IACtHR should adopt a similar form of international judicial review to the ECtHR practices of the national margin of appreciation. Due to the arguable value of the margin of appreciation for inter-American jurisprudence, Chapter V has compared some specific case groups within European and inter-American case law and analyzed the legal scholarly debate around the concept of the national margin of appreciation. Based on this approach, this chapter has pointed out the advantages of affording national authorities the right margin of appreciation based on a specific human rights enforcement context. The analysis of European human rights jurisprudence has illustrated how it is possible to incorporate contextual elements into jurisprudential approaches to the practice of international judicial review. This chapter has also addressed the problems related to weaker forms of international judicial review in Latin America. Due to the risks associated with fragile Latin American democracies, this chapter has underscored the argument that the IACtHR should adopt a context-based theory of international judicial review of domestic legislation.

The theory of mixed-form inter-American judicial review that this study has proposed in Chapter VI is intended to be a context-based theory of human rights adjudication for the IACtHR. This theory draws on the evolution of domestic and inter-American human rights law within the Latin American human rights enforcement context. This context has been characterized by the persistence of illiberal practices within the domestic realm. These illiberal practices can include the problems associated with authoritarianism, which relates to violations of civil and political rights, and of material inequality, which relates to the underenforcement

of socioeconomic rights. Within this context, Chapter VI has tried to reconcile the inter-American practice of strong-form international judicial review with the practice of weak-form judicial review. According to the theory of mixed-form judicial review, the IACtHR should reconcile the practice of strong review of domestic law that *flagrantly* violates inter-American human rights law on civil and political rights with the practice of weak review of domestic legislation that goes against the inter-American framework for socioeconomic rights enforcement.

This study has argued that mixed-form inter-American judicial review is the most legitimate and effective form of international judicial review that the IACtHR could adopt. This theory argues against the overall strong-review approach adopted by the court throughout inter-American jurisprudence, which has become a defining feature of the legal culture of international human rights enforcement in Latin America. The IACtHR has frequently relied on the practice of strong review of domestic legislation, especially since it started to decide cases involving domestic amnesty statues within the IAS. This transitional justice phase of inter-American jurisprudence was a reaction against the systematic gross human rights violations practiced by domestic authoritarian regimes. This phase was responsible for the emergence of conventionality control of domestic laws, which has become the overall approach to reviewing domestic legislation. With the establishment of new democratic governments in Latin America, issues like poverty and institutional failure started to occupy the attention of legal authorities and scholars. These issues have given rise to the transformative justice phase of inter-American jurisprudence. Chapter VI has argued that the practice of strong judicial review might not be the most appropriate form of judicial review for this more recent phase of transformative justice.

The introduction of weak judicial review of domestic laws into inter-American jurisprudence has the potential to strengthen the legitimacy and effectiveness of the direct enforcement of socioeconomic rights. This argument is based on the late evolution of inter-American legislation on socioeconomic rights and also on the even more recent emergence of inter-American case law on these rights. It is a fact that there is no substantial body of inter-American legislation and jurisprudence on socioeconomic rights. In order to avoid the illegitimate practice of international judicial activism, Chapter VI has argued that the IACtHR should limit its authority to the practice of weak review in cases involving socioeconomic rights. This chapter has also explained the reasons for weak review being the most effective

approach to the enforcement of these rights. This effectiveness is due to the fact that weak review decision-making enables more inter-institutional interaction for the review of legislation. Although courts may have a say on legislation pertaining to socioeconomic rights, within weak judicial review, legislatures should have the most authoritative say on issues relating to these rights. When practicing weak international judicial review, the IACtHR should therefore defer the final decision on the validity of legislation on socioeconomic rights to domestic legislatures.

It is worth underscoring once again the importance of increasing inter-institutional interaction within the IAS by introducing the practice of weak international judicial review. Although it is true that the IACtHR should not invalidate domestic laws on socioeconomic rights, the court can still address the blind spots and burdens of inertia associated with domestic legislative procedures. The broad scope of weak judicial review enables the IACtHR to notify national legislatures about the inconsistencies of domestic laws on socioeconomic rights. The IACtHR should not refrain from its duty to point out which specific legislative provisions are not in accordance with inter-American human rights regime. Nevertheless, the IACtHR should give national authorities the final say on the validity of legislation on socioeconomic rights at least based on the contemporary weak normative dimension of these rights within inter-American human rights law. The court should, however, still monitor compliance with the judgement and check whether national authorities amend inconsistent domestic laws in a reasonable time frame. In a nutshell, all these features of weak inter-American judicial review prove that this form of decision-making does not necessarily harm the normative force of socioeconomic rights as human rights but arguably tries to strengthen it over time. In the future, the practice of strong inter-American judicial review may become the most legitimate and effective approach to the direct enforcement of socioeconomic rights. However, this time has not yet come.

The last chapter of this study has tried to prove the practical value of the theory of mixed-form inter-American judicial review by applying it to the review of two Brazilian laws: the Brazilian amnesty law and CA 95. These two laws best fit the practical test of mixed-form review because the first is a piece of legislation that brings about violations of civil and political rights, while the second offers a legal basis for violations of socioeconomic rights within domestic law. Chapter VII has offered the reasons for reviewing each piece of legislation and also explained the suitability of each form of judicial review for each case. In line with this, this

chapter has argued that the amnesty law should be subject to strong judicial review, and that national authorities should guarantee its effectiveness within domestic law. Regarding CA 95, the IACtHR should practice the weak review of this constitutional amendment and refer the matter back to the national legislature to be politically reviewed. After this brief summary of the study, in this conclusion, I would like to highlight the reasons why legal scholars and authorities should pay greater attention to the emergence of Latin American cosmopolitan constitutionalism and how new jurisprudential approaches to this new context for human rights enforcement have the potential to keep Latin American constitutionalism on the path to global constitutionalism.

Global constitutionalism represents a recent thread of jurisprudential approaches to issues of constitutional law based on at least three main indispensable fields of research, i.e., human rights, democracy, and the rule of law. However, these three pillars of global constitutionalism do not point to a single direction that constitutional theory and practices should go in. They are broad concepts that accept diverse interpretations. In light of this wide variety of approaches to democracy, human rights and the rule of law, an appropriate question is what could represent a common concern among all these scholars and different theories of global constitutionalism with regard to the evolution of Latin American constitutionalism. We may call this question a search for the meaning of global constitutionalism in Latin America, which tries to assess what is particularly useful in this new form of constitutional law and scholarship around the globe for the evolution of Latin American constitutionalism.

Here, again, different answers may come to mind. Based on my experience with this concept during this study, it seems to me that what could unify all these global constitutional scholars and theories is their opposition to forms of insular evolution of constitutionalism in Latin America. We can regard global constitutionalism and its transformative potential for constitutional lawmaking and scholarship as a consistent effort to combat the insular evolution of domestic constitutional law in Latin America.[956] In line with this, this study has focused on how cosmopolitan constitutionalism forms a new context that has enabled different perspectives on prominent issues of constitutional law, like the practice of judicial review. Although

[956]This does not mean that legal authorities and scholars should not be aware of the surrounding context for rights enforcement. Constitutional theory should always be context-based, but constitutional exceptionalism can become a dangerous form of constitutionalism in Latin America. Exceptionalism may end up in insular or hermetic constitutionalism and hinder the practice of authentic constitutionalism, i.e., constitutionalism that is able to dismantle the illiberal structures of power in society. In fact, constitutional façades have been a common element in Latin American constitutional history.

constitutional law has been a research field primarily focused on elements of domestic positive law, I hope this study has at least demonstrated how elements of international human rights law have played a transformative role toward domestic constitutional practices in Latin America. Due to the emergence of a new context for human rights enforcement in the region, national constitutional orders no longer involve only elements of domestic law. Legal authorities and scholars should therefore give greater attention to the evolution of inter-American human rights law and adopt it as a meaningful reference point for domestic constitutional theory and adjudication. By doing so, they can oppose the traditional insular evolution of constitutionalism that has always ended up poorly in Latin America.

Latin American countries have traditionally alternated between very promising and very depressing times for the proper evolution of constitutionalism. However, even progressive constitutional texts have not been able to break out of the region's never-ending cycle of illiberalism.[957] This never-ending cycle has been brought about by the insular development of domestic constitutionalism in Latin America. It is possible to illustrate this inevitable fate of Latin American constitutions by analyzing the recent evolution of Brazilian constitutionalism with regard to the issues of authoritarianism and material inequality. The fact that the Brazilian amnesty law remains in force and the adoption of CA 95 reveal that Brazilian constitutionalism is in a never-ending constituent crisis. This crisis has been a traditional feature of Brazilian constitutionalism, and the most common response to it has been to adopt a new constitutional text. Since the first 1824 constitution, Brazilians have adopted 8 different constitutions in less than two centuries. This is evidence of a very problematic evolution of domestic constitutionalism.

When faced with the challenges that illiberal practices have offered, Brazilian constitutional politics has opted to take the easy path of rhetorically adopting new constitutional texts.[958] These new constitutional texts often represented self-fulfilling prophecies in which the constituent authorities opted to postpone necessary structural reforms simply by stating them

[957]This is true if we compare constitutional texts that were issued in different periods like the 1917 Mexican constitution and the 1999 Venezuelan constitution, for instance. The first failed to provide a meaningful reference point for the enforcement of socioeconomic rights in Mexico, while the later was no match for the most recent authoritarian practices in Venezuela.

[958]Raymundo Faoro wrote a classic study of the persistent non-democratic structures of power in Brazil despite the adoption of new constitutions, see: Raymundo Faoro, Os Donos do Poder. Formação do Patronato Politico Brasileiro. 5th ed., (São Paulo: Globo, 2012). Fábio Konder Comparato has also addressed the oligarchical structures of power throughout Brazilian constitutional history, see: Fábio Konder Comparato, A Oligarquia Brasileira: Visão Histórica, (São Paulo: Contracorrente, 2017).

within the constitutional text. With the passage of time, Brazilians can hardly note the normative force of the constitution, given that the constitutional text is no match for the unending illiberal practices within domestic law. The constitution gradually loses its significance in society and the solution always seems to be the adoption of a new constitutional text, completing the superficially revolutionary cycle. The Brazilian sociologist and politician Florestan Fernandes has referred to this complicated evolution of constitutionalism in Latin America as "interrupted revolutions."[959] He described them as a "repetitive political phenomenon" in the region since the end of colonialism.[960] For him, one important feature of this traditional phenomenon was that the revolutions are interrupted only with regard to the interests of the underprivileged in society but not with regard to the most privileged social groups.[961] In Brazil, and in Latin America more generally, the constitution has been misused to the detriment of the emancipatory power of constitutionalism. The adoption of constitutional façades has been evidence of this phenomenon.[962]

However, is the 1988 constitution just another element of this constant interruption of the emancipatory power of constitutionalism in Brazil? Is this constitution, like all the other Brazilian constitutions in history, destined to fail? The answer to these questions is arguably: not necessarily. The cosmopolitan form of the Brazilian constitution may become a powerful instrument against the insular evolution of Brazilian constitutionalism. Cosmopolitan constitutionalism may keep Latin American constitutions on the path to global constitutionalism. In this study, the adoption of the 1988 constitution has been described as a way for Brazilian constitutionalism to break out of the never-ending history of illiberalism. It is true that this constitution emerged and is still immersed in the same context of human rights underenforcement that has characterized Latin America for a very long time. Nevertheless, the current constitution has become the most important trigger for the bottom-up emergence of cosmopolitan constitutionalism within Brazilian law. The current constitutional order has gradually opened up Brazilian constitutional practices to the enforcement of international

[959]Florestan Fernandes, "Reflexão sobre as 'Revoluções Interrompidas' (Uma Rotação de Perspectivas)," in *Poder e Contrapoder na América Latina*, 2nd ed., (São Paulo: Expressão Popular, 2015).
[960]Ibid, 94.
[961]Ibid, 95.
[962]A constitutional façade stands on the opposite pole of the type of constitution that enables structural changes in society by means of law. Germans call their constitution *Grundgesetz* and, in fact, this constitution has so far represented a solid normative ground for the reproduction of legality in the country, despite the surrounding disturbing atmosphere of constitutionalism in Europe. On this issue, see: Kriszta Kovács, Mattias Kumm, Maximilian Steinbeis, Gábor Attila Tóth, "Introduction: Constitutional Resilience and the German *Grundgesetz*," Verfassungsblog, December 6, 2018, available at: https://verfassungsblog.de/introduction-constitutional-resilience-and-the-german-grundgesetz/.

human rights law. It is based on this more intimate relationship with international human rights law that the 1988 constitution can gradually find a way out of hermetic constitutionalism and keep Brazilian constitutionalism on the path to global constitutionalism.

Ultimately, the Brazilian cosmopolitan constitution offers all the elements necessary to oppose the traditional insular evolution of constitutionalism in Brazil. Chapter II has described the cosmopolitan interaction between the domestic and inter-American institutions by analyzing some Brazilian cases before the IACtHR and how they have played a transformative role toward domestic practices of state authority. These cases involved different issues like the treatment of mental illnesses within psychiatric institutions under the public health system, the use of police violence in the Brazilian favelas and the fight against contemporary forms of slavery. Insofar as the cosmopolitan constitution represents a form of constitutionalism that exposes traditional domestic human rights violations to inter-American review, it offers a new horizon for the evolution of Brazilian constitutionalism. As this study has tried to demonstrate, national authorities are now able to make use of the inter-American framework for human rights enforcement. This regional integration through human rights law in Latin America may gradually lead to a way out of insular constitutionalism and rescue constitutions from becoming simple façades that hide domestic illiberal practices.

Yet, how can we be so sure that the Brazilian cosmopolitan constitution represents an authentic means of countering the insular evolution of domestic constitutionalism? How can we affirm that this constitution can help Brazilian constitutionalism to break out of the vicious cycle of illiberalism? Finally, how can we know with certainty that the cosmopolitan constitution can escape the indelible fate of all the past constitutions in the country? The answers to these questions arguably relate to how this constitution, despite all the challenges that it has been through, has showed resilience and, most importantly, how it has become an ally of the underprivileged Brazilians when they contest the illiberal structures of power within Brazilian society. Even if the 1988 constitution did not succeed in bringing an end to many traditional illiberal practices in the country, we can see its resilience and increasing importance throughout the last 30 years if we focus on how socially oppressed groups in Brazil started to adopt constitutional parlance in order to fight against their illegitimate oppression. In a historical perspective, this is, in fact, a new feature that the 1988 constitution has brought to Brazilian constitutionalism. The 1988 constitution has, for the first time in history, empowered socially excluded groups with the rhetoric of human rights, democracy and the rule of law. They

have, since then, used this rhetoric to fight against their oppression in Brazilian society. This is arguably the most compelling argument for the usefulness of global constitutionalism within Brazilian law. This empowerment of the underprivileged Brazilians can be historically illustrated by the evolution of Brazilian law and its analysis by one notable legal scholar.

During the 1970s, the Portuguese legal sociologist Boaventura de Sousa Santos lived for some months in a Brazilian favela, which he called *Pasargada*.[963] He used this experience to describe the existence and structure of legal pluralism within Brazilian law.[964] For Santos, *Pasagarda law* existed parallel to official state law during the 1964-1985 Brazilian dictatorship.[965] Santos described how *Pasargada law* worked by describing dispute prevention and settlement carried out by a Resident's Association (RA) in the favela.[966] He noted that, within the authoritarian and extremely unfair class structure of Brazilian society, *Pasargada law* was simultaneously ignored and tolerated by the state authorities. In this context of extreme social oppression and exclusion, the internal unofficial legality of the favela became one of the only ways for the *Pasargadians* to have access to justice.[967]

For Santos, faced with extreme marginalization, favela dwellers found their way through Brazilian society and came up with a new type of social order mediated by an unofficial legality. He believed that this spontaneous emergence of a parallel legal system was to the benefit of the favela dwellers and could serve as an example to official state authorities to be more considerate of the different forms of living in the Brazilian peripheries. For him, although *Pasargada* was not "an idyllic community," this did not "prevent its internal legality from hinting at some of the characteristics of an *emancipatory legal process*" [968] (my emphasis).

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[963] *Pasargada* actually refers to the favela of *Jacarezinho* in Rio de Janeiro.

[964] Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," in *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, (New York: Routledge, 1995), 124-248.

[965] "Because of the structural inaccessibility of the state legal system, and especially because of the illegal character of the favelas as urban settlements, the popular classes living in them devise adaptive strategies aimed at securing the minimal social ordering of community relations. One such strategy involves the creation of an internal legality, parallel to (and sometimes conflicting with) state official legality;" Ibid, 124.

[966] This RA was composed of a president, a secretary and a treasurer, who were financed by local residents and had the most immediate authority over different types of legal relationships between *Pasargadians*; for instance, the parallel legal relationship of selling and buying property in *Pasargada*. Santos has pointed out that the RA did not claim authority to settle issues pertaining to criminal law.

[967] At that time, Santos affirmed that: "Unofficial legality is one of the few instruments that can be used by the urban oppressed classes to organize community life, enhance the stability of the settlement, and thus maximize the possibility of resistance against intervention by the dominant classes, thereby increasing the political cost of any such action." Ibid, 237-238. For Santos, *Pasargada law* followed an ideal of creating a justice system that was "accessible, cheap, quick, intelligible and reasonable." Ibid, 240.

[968] Ibid, 248.

Looking at Santos' study and the evolution of Brazilian constitutionalism since then, it seems that, beyond attesting to the existence of legal pluralism, *Pasargada law* also attested to the insular evolution of different legal orders in Brazil. One particular feature of legal pluralism that Santos could not observe at that time is that different legal orders, if they continue to reproduce in a hermetic way, become imperialistic and, ultimately, self-destructive.[969]

Several decades after Santos's stay in *Pasargada*, many things have changed in the Brazilian favelas. In many of them, the strategies for securing the minimal social ordering of community relations have been corrupted. The Brazilian favelas have seen the emergence of paramilitary organizations, most of them financed by drug dealers, which started to threaten the residents. The *milícias*, as they are called in Brazil, perform similar functions to the ones the RA used to have in *Pasargada*. Beyond that, they have become a parallel power to the Brazilian state, using force to make the interests of organized crime prevail in their territories. Most importantly, the *milícias* have started to spread their influence into the Brazilian state, controlling the votes of favela residents and electing politicians that support their illegal businesses in the favelas. In this new context, *Pasargada law* has surprisingly lost its appeal in comparison to state law under the rule of the 1988 constitution.[970] In fact, some favela dwellers have started to regard the new context for the reproduction of legality offered by the 1988 constitution as a powerful instrument against the innumerable violations of their human rights. Throughout its last 30 years, the 1988 constitution has not only showed resistance to Brazilian illiberalism but it has also attracted an unexpected audience for constitutional law: the *Pasargadians* themselves. Most importantly, it has turned this unexpected audience into agents of authentic constitutionalism within Brazilian law. Two recent examples of this fact are worth mentioning; they are: Marielle Franco and Jean Wyllys.

Marielle Franco was born in *Maré*, another favela in Rio de Janeiro. Besides being poor, she was also black, a single mother and had a same-sex partner. Marielle assumed all these historically oppressed positions in Brazilian society with pride and, beyond that, ran for office as a city councilor in Rio de Janeiro, where she was elected in 2017. As a politician, she

[969]See this argument within studies of societal constitutionalism. See: Andreas Fischer-Lescano, Gunther Teubner, Regime-Kollisionen. Zur Fragmentierung des Globalen Rechts, (Frankfurt am Main: Suhrkamp, 2006); Gunther Teubner, Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung, (Frankfurt am Main: Suhrkamp, 2012).

[970]In an interview, Santos admitted that, during the Brazilian dictatorship, the favelas were among the most democratic places in Brazil but, with the increasing authority of the drug traders, the civil organization between favela dwellers has suffered severe backlashes. See: André Costa, "Boaventura Revisita Pasárgada," Vozerio. Mais Vozes, Mais Rio, November 11, 2015, available at: http://vozerio.org.br/Boaventura-revisita-Pasargada.

advocated for the rights of poor women in the Brazilian peripheries, many of whom shared the same historically discriminated positions that she had. Sadly, she was murdered in 2018 by the paramilitary groups that are active in the favelas of Rio de Janeiro.[971] Jean Wyllys is another example of how law became surprisingly appealing for the oppressed Brazilians. Wyllys was born poor in the periphery of *Alagoinhas*, a city in the northeast of Brazil, which is one of the poorest parts of the country. He struggled to get an education and, eventually, became a journalist. Later, he joined a TV show and, due to his national fame, ran for office as a federal deputy, becoming one of the first openly homosexual congressmen in Brazil. Jean was forced to leave Brazil, despite being elected for his third period in congress. He constantly received threats for advocating for LGBT people's rights and, after his friend Marielle's murder, decided it was best to leave Brazil and make opposition to the new elected Bolsonaro's government from abroad.[972]

Jean and Marielle were both well-known politicians in Brazil and their histories demonstrate that there is something in the new legal context offered by the 1988 constitution that is very appealing to individuals engaged in the fight against the eternal cycle of illiberalism in Brazil. This is arguably related to the emergence of global constitutionalism within Brazilian law. Since then, the underprivileged Brazilians have started looking at the new constitutional order as a powerful means of opposing their historical oppression in the country. Why did they stop regarding their own *Pasargada laws* as the best way through Brazilian society? What is now so appealing in constitutional law that has attracted the attention and energy of these disadvantaged Brazilians? I argue that the global constitutionalism framework of the 1988 Brazilian constitution has been responsible for a new context for the reproduction of legality that, despite all problems offered by the persistent illiberal practices within domestic law, has turned democracy, human rights and the rule of law into powerful allies of the underprivileged in Brazil. Marielle and Jean are proof that the 1988 constitution can act as a powerful instrument against the never-ending cycle of illiberalism in Brazil, given that it has, for the first time, empowered those most affected by the illiberal practices of state authority. Most importantly, Marielle and Jean teach us legal scholars that constitutionalism is by itself legally

[971]Marielle was investigating the *milícias* when she was shot in her car in the city center of Rio de Janeiro. She and her driver passed out due to the shooting. After more than one year, state authorities have still not clarified all the circumstances of Marielle's murder, which is arguably the most important political crime in Brazil's contemporary history.

[972]After spending some months in Berlin, Jean Wyllys is currently doing research at Harvard University.

transformative and that we all should be aware of this and take responsibility for enacting change within our different roles in society.[973]

Social change by means of the constitution is not only a matter of keeping faith with the emancipatory potential of constitutionalism. It also involves a responsibility, more specifically a responsibility on the part of legal authorities and, not surprisingly, of legal scholars, who have exercised a major influence over lawmaking and legal interpretation in Latin America. Building a bridge out of insular constitutionalism towards global constitutionalism is a task that lawyers share with other institutions and professionals within Latin American societies. This task also helps us understand the fact that when authorities insist on ignoring developments in constitutionalism around the globe, they fail at facilitating the proper evolution of constitutionalism. The Brazilian constitutional court has certainly failed at facilitating the consistent evolution of Brazilian constitutionalism when it decided that the amnesty statute was valid within Brazilian law. It is high time for legal authorities and scholars to work on better normative approaches to combat the insular evolution of domestic constitutionalism. This task underscores the importance of jurisprudential approaches like mixed-form theory of inter-American judicial review. Concepts like cosmopolitan and global constitutionalism can arguably be useful for these necessary new jurisprudential approaches to Latin American constitutionalism.

Legal authorities and scholars still have much work to do with regard to the evolution of global constitutionalism in Latin America due to several context-relevant issues like, for instance, the historical skepticism of Latin American people towards international institutions.[974] Widespread populism and even obscurantism in politics are other current obstacles to the evolution of global constitutionalism in the region. However, the adoption and refinement of serious commitments to human rights, democracy and the rule of law are certainly not impossible tasks in Latin America. In fact, if the *Pasargadians* made it there, we all should also be able to make it. Global constitutionalism, as an innovative way of constitutional lawmaking and constitutional theory, is able to address more effectively the historical

[973]Authentic constitutionalism is legal transformative by itself. "Transformative constitutionalism" is, in fact, a redundant expression used by many public lawyers in Latin America.

[974]This comes before the most recent trend against *globalism*. In Latin America, this skepticism against international institutions was already present during the 1980s and 1990s: "The underlying bias of many international treaties and institutions toward the 'North' is obviously much more present in Latin American than in European legal consciousness." Armin Von Bogdandy, "Ius Constitutionale Commune en América Latina. Observations on Transformative Constitutionalism," in *Transformative Constitutionalism in Latin America*, eds. Von Bogdandy et al, (Oxford: Oxford University Press, 2017), 27-48, 39.

oppression of people in the Global South, given that it transforms them from audience members into agents. Legal authorities and scholars have a special responsibility in this process of empowering oppressed people by means of lawmaking and legal theory, skeptics notwithstanding.

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